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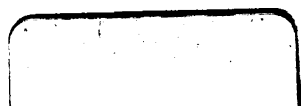
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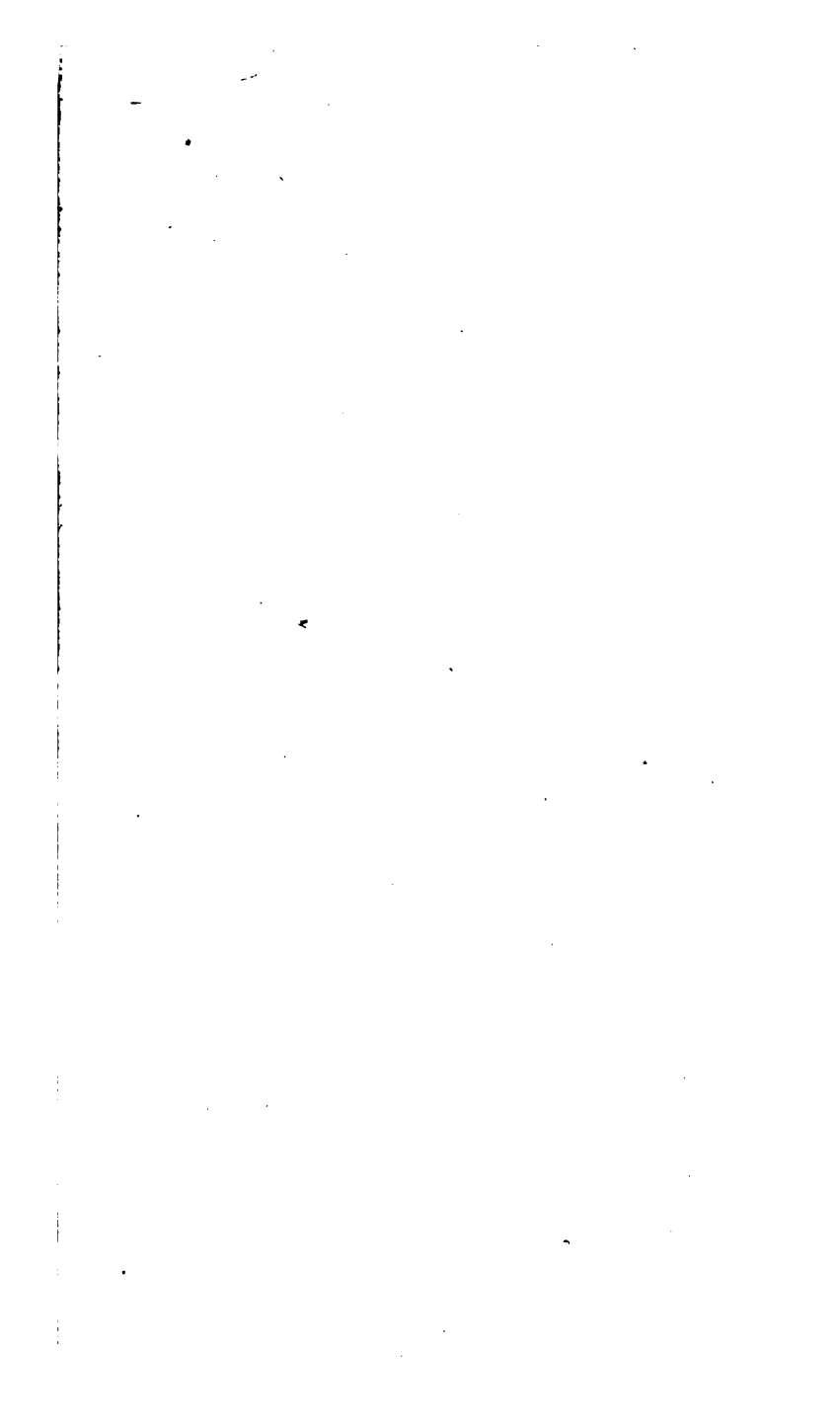


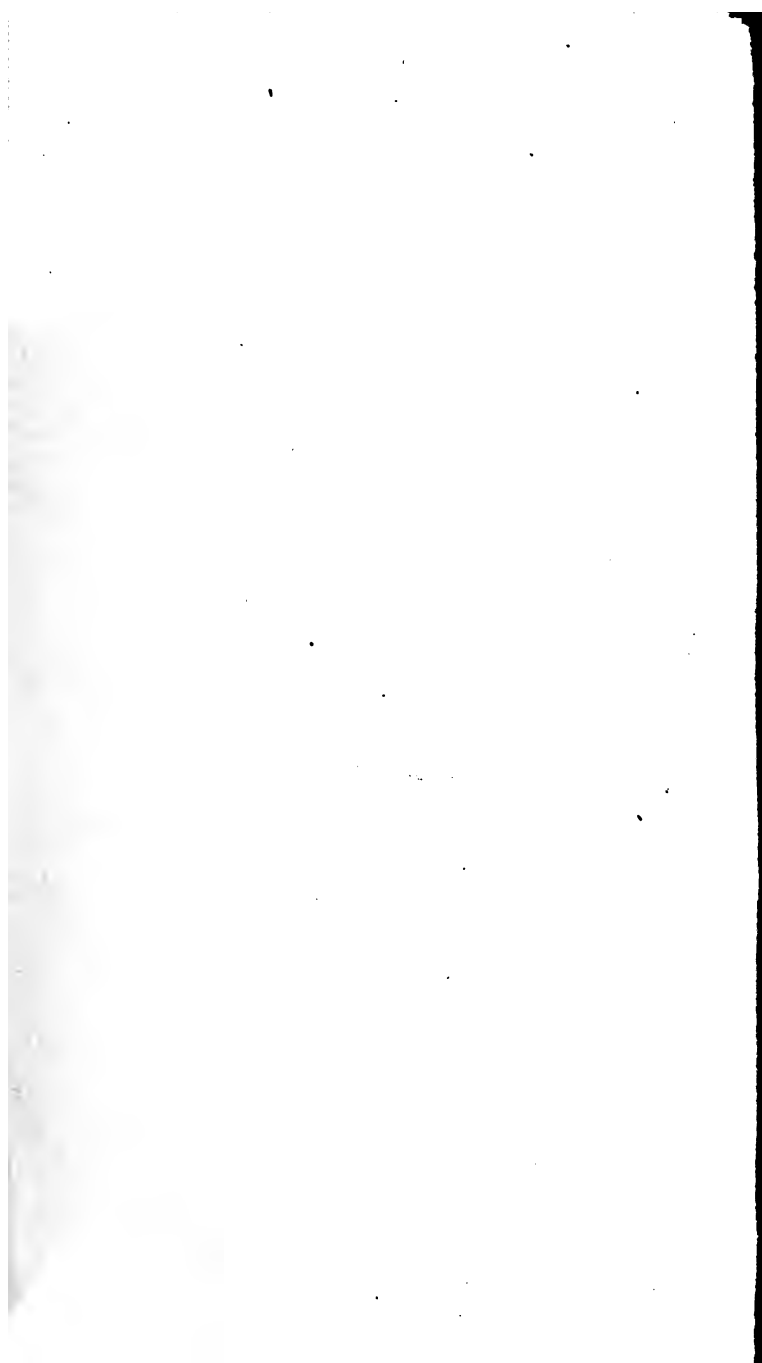




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**ELEMENTARY VIEW**  
**OF THE**  
**PROCEEDINGS IN AN ACTION**  
**IN THE**  
**Supreme Court.**

**FOUNDED ON "SMITH'S ACTION AT LAW."**

*W. D. I. Foulkes*  
**BY W. D. I. FOULKES,**

**BARRISTER-AT-LAW,**

**JOINT EDITOR OF THE "LICENSING ACTS" AND THE "JUDICATURE ACTS."**

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## PREFACE.

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THIS book first appeared as the twelfth edition of Mr. J. W. Smith's "Action-at-Law," but the changes introduced by the Judicature Acts and carried still further since its first appearance have made such extensive alterations and additions necessary as to give it no just right to the guarantee of his name as its author. The "Action-at-Law," however, is still the basis and model of the "Action in the Supreme Court." In this edition the Rules of the Supreme Court at the end of the book have been supplemented by the Rules of December, 1876; May, 1877; June, 1877; November, 1878; and March, 1879, which have been promulgated since the first edition. The effect of these rules has been reproduced in the body of the book, and the important cases which have been decided since the first edition are duly noticed.

W. D. I. F.

1, KING'S BENCH WALK,  
*April, 1879.*



## PREFACE TO THE FIRST EDITION.

---

IN 1836 Mr. John William Smith, the learned editor of the "Leading Cases," wrote his "Elementary View of the Proceedings in an Action-at-Law." The book was little more than a tract, containing only 174 pages and not divided into chapters. Since then it has gone through eleven editions, and has been considerably increased in bulk by the additions which successive legal changes required. The organic reconstruction of the law of actions effected by the Judicature Acts has made a fresh arrangement of the subject necessary, and notwithstanding that Chancery, Probate and Admiralty actions are now brought within the scope of the volume, it has been found possible, by reason of the greater uniformity of the new procedure, to reduce considerably the size of the present book as compared with the Eleventh Edition of "Smith's Action-at-Law."

The writer's object has been to reproduce so much of Mr. Smith's and his editors' work as is still applicable to the subject; to supplement it with his own reading of the new law, and to arrange the whole in as simple and intelligible a form as possible. The chronological order of the

events in an action has, in the main, been strictly followed, except in such subjects as "Summary Proceedings," in which it became necessary to abandon the order of time for the purpose of grouping. The "Selected Forms" have been arranged with the view of enabling the reader to realise, by means of documentary samples, the general course of an action in the Supreme Court. The Rules of the Supreme Court as amended by the Judges from time to time have been given at the end of the book, as the student cannot too soon familiarise himself with what is in fact the code of procedure in an action. The arrangement of the body of the book is not the same as that of the Rules, and where both the original and reprinted matter cover the same ground the writer has taken pains to use his own language rather than that of the Rules, so that the reader may be assisted by a variety both of form and expression to grasp something more than the mere words of the subject.

1, KING'S BENCH WALK,

*July, 1876.*

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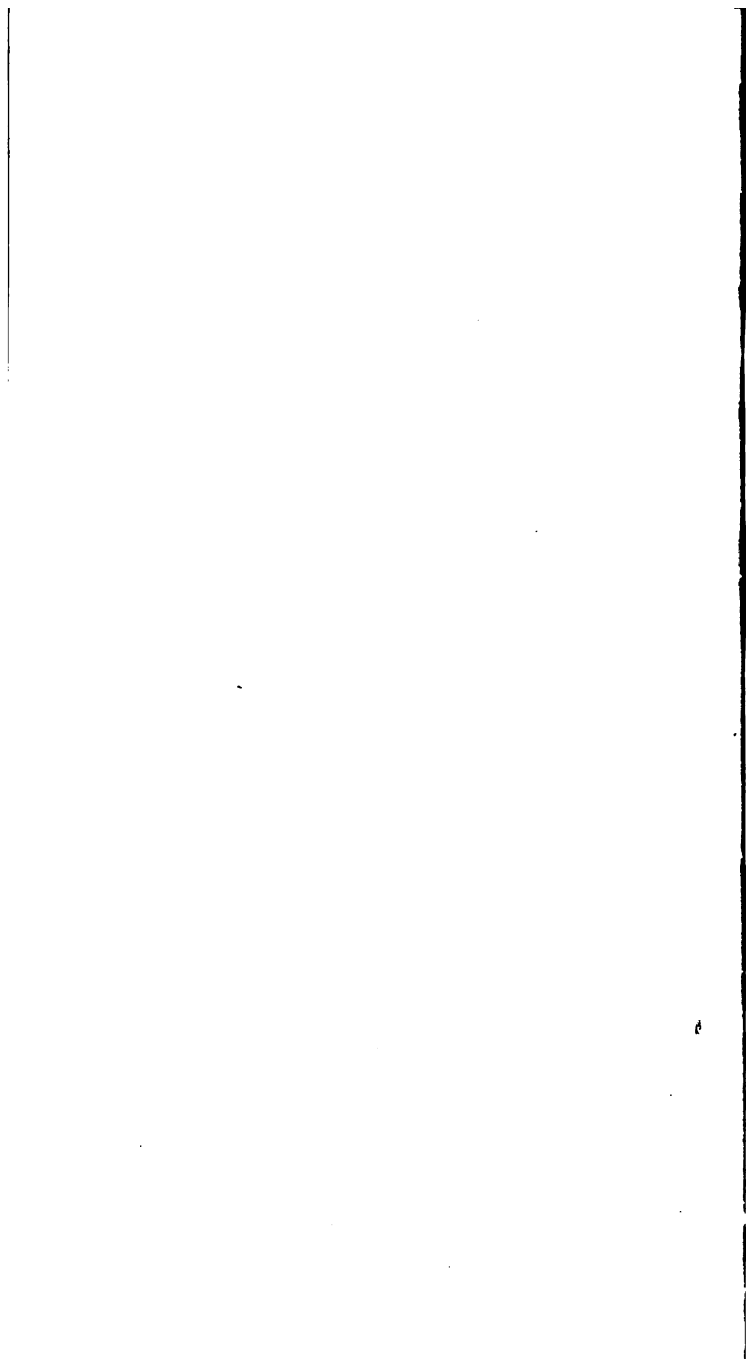
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AN  
ELEMENTARY VIEW OF THE PROCEEDINGS  
IN AN  
ACTION IN THE SUPREME COURT.

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CHAPTER I.

THE SUPREME COURT.

AN action is a formal proceeding instituted in a court of justice for the purpose of obtaining redress for a civil injury. It is defined by the "Mirror" to be "the lawful demand of one's right," and by Bracton and Fleta, following the language of the Roman law, to be "*jus persequendi in judicio id quod alicui debetur.*" The term includes not only actions at common law of which the ancient authorities on English law just cited were speaking and to which down to the year 1873 it was exclusively applied, but suits in equity, Admiralty causes, and Probate proceedings to which it was applied by the Judicature Acts.<sup>a</sup> An action is, on the other hand, distinguished from those less formal proceedings originated by motion and petition which are in the Judicature Acts termed "matters."

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<sup>a</sup> Ord. I. 1, p. 249.

The design of the present treatise is to trace in a simple and intelligible manner the steps by which this "demand of one's right" is to be pursued in the Supreme Court of Judicature in England. Before entering on a description of those steps themselves, it seems necessary to describe the tribunal before which they are taken.

The Supreme Court of Judicature is now the one Superior Court of law and equity in the kingdom. It has been formed by a consolidation of the High Court of Chancery, the Courts of Queen's Bench, Common Pleas, and Exchequer, and the Probate, Divorce, and Admiralty Courts,<sup>b</sup> each of which in itself has a history of great importance and interest.

The Courts of Queen's Bench, Common Pleas, and Exchequer, formerly the three Superior Courts of Common Law, derived their origin from a Court called, from the place in which it was ordinarily held, the "Aula Regis," or "Curia Regis," which under our early Norman princes was the supreme court of justice in England. Of this Court the sovereign himself was the judge, assisted by the grand justiciary, who in the absence of the sovereign acted as his deputy, and by the other principal officers of state. The Court accompanied the monarch in those tours of his dominions which were frequently made at that time; and one of the chief objects of these royal progresses was to afford all the king's subjects the opportunity of applying to his Court for justice.

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<sup>b</sup> Jud. Act, 1873, s. 3.



The whole legal business of the kingdom was not, and could not have been, transacted in this Court. The labours of the Aula Regis were lightened by the Sheriff's County Court and Tourn, and by the Leets and Courts Baron of the different manors throughout England. In these inferior courts many even important causes, and all petty causes, were decided; for it was thought beneath the dignity of the King's Court to take cognizance of any dispute the subject of which was of less value than 40s., a considerable sum in those days, and hence the practice which even now obtains of staying proceedings in an action, when it appears that the plaintiff's demand is less than 40s., and the cause is cognizable by an inferior court. These local tribunals had, in many cases, a jurisdiction concurrent with that of the Aula Regis, but much more confidence was reposed by the people at large in the wisdom and integrity of the supreme tribunal, which was seldom influenced by those local prejudices or interests which were apt to sway the courts of the lord and the sheriff. In process of time means were found of reserving almost every matter of importance for the decision of the Aula Regis, and parties were willing even to pay a sum of money to the Crown for permission to sue in that court, which payments, as appears from the records of the Exchequer, were a substantial source of revenue.

In consequence of the preference thus shown, the Aula Regis became overburdened with busi-

## SUPREME COURT.

ently so much in arrear, that of suitors and advocates was one end of the kingdom to the eniences of this ambulatory degree mitigated by the ap-eign of Henry the Second of or "in itinere," whose Courts and represented that of the the districts to which they tra-tually required the insertion a Charta, "*Communia placita um nostram, sed teneantur in*

This clause, enjoining "that ld no longer follow the King's n some fixed place," was com-g the Court of Common Pleas as the words "Common Pleas," istinction to "Crown Pleas," es by which the interests of t affected, the consequence s, that the proceedings in ions, instead of being carried Aula Regis happened to be, the Court of Common Pleas his alteration took place in ohn, and may be looked on as entralization of our present in the metropolis.

at of the Common Pleas at it removed one grievance although the suitors had no ut after the King's Court, yet

they had to come from the most distant parts of England up to Westminster. Accordingly, by the Statute of Westminster the Second, passed in the thirteenth year of the reign of Edward the First, the parties who, till that time, had been obliged to appear in person before the Court, except in some cases of special favour, obtained the privilege of prosecuting and defending their suits by attorney from their commencement; and thus it was that the employment of an attorney or, as he is now called, a solicitor originated.

After the Common Pleas were stationed at Westminster, the Aula Regis still continued to attend the king's person, and to decide causes in which the Crown was concerned. The great lawyers however were mostly attracted by the more lucrative business transacted at Westminster, and established themselves in that neighbourhood, where they founded the Inns of Court. Moreover, the importance of the Aula Regis was still further diminished in the reign of Edward the First, who, by the advice of the most eminent lawyers of that day, determined to carry out a more complete distribution of the judicature. The Court of Common Pleas he left, as he found it, in possession of the civil business of the kingdom. The Exchequer he entrusted with the exclusive management of revenue matters, while the King's Bench, which was the remnant of the Aula Regis, continued to possess the criminal jurisdiction of that ancient Court, and also a superintending power over all the inferior tribunals in the kingdom, commanding

them by prerogative writ of mandamus, to perform what the law required; by writ of prohibition to abstain from what it prohibited; removing their proceedings into itself by certiorari; and reversing their decisions by writ of error or false judgment. This Court alone retained the close personal connection with the sovereign which belonged to the *Aula Regis*. Edward the First often presided there, and it was distinguished by the presence of the monarch, even so late as the seventeenth century, in the person of King James the First. During the Protectorate of Cromwell its name was modified into the "Upper Bench." The sovereign might always order this Court to accompany his own person, a command which the clause in *Magna Charta* prohibited him from imposing on the Common Pleas, and therefore it was that writs returnable in the latter Court were made returnable "at Westminster;" but in the Queen's Bench, "before the Queen herself, wheresoever she should then be in England." On one occasion, Edward the First commanded the Court of King's Bench to follow him into Scotland, and it actually sat for some time at Roxburgh.

In ordinary times it was found so much more convenient to hold the Queen's Bench in the same place as the Common Pleas and Exchequer, that it also had, for many centuries, except during the civil wars and the plague, been stationary at Westminster. And, although the Queen's Bench and Exchequer had at first, as has been explained, no jurisdiction over purely civil causes, which were

all entrusted to the Common Pleas, yet, by a series of fictions, they contrived to draw all personal actions within their jurisdiction. For the Queen's Bench declared that a person in the custody of its marshal was before it for every purpose, and, as actions of trespass were considered to be within its jurisdiction, being of a criminal nature and punishable by a fine paid to the Crown, a writ, called a bill of Middlesex, was permitted to be issued charging the defendant with a trespass, being then a cause for which a man might be arrested; whereupon he was taken and committed to the Marshalsea, and, being once there, the plaintiff was allowed to sue him for any cause of action. Afterwards, the judges of the Queen's Bench carried the principle further, and held, that the defendant's appearance or putting in bail would answer the same purpose: maintaining that, in those cases, though not in the real, he was in the constructive, custody of the marshal. Accordingly, until the year 1832, all writs issuing out of the Queen's Bench described the cause of action to be trespass, in bailable cases mentioning the real ground afterwards in a "*ac etiam*" clause, as if it were merely subsidiary to the fictitious claim; and every declaration by bill in the Queen's Bench stated the defendant to be in the custody of the Marshal of the Marshalsea. The Court of Exchequer, in its turn, adopted a similar mode of extending its jurisdiction; for the plaintiff in his writ and declaration stated that he was "a debtor to the king," and less able to pay his debt by

reason of the defendant's conduct, the writ being from this cause called the writ of "quo minus;" and this statement, though in ninety-nine cases out of a hundred a mere fiction, was not allowed to be contradicted, and was held to render the cause of action a matter affecting the revenue, so as to invest the Exchequer with a jurisdiction over it. Thus did the Courts of Queen's Bench and Exchequer obtain a jurisdiction co-extensive with that of the Common Pleas in personal actions; a jurisdiction which the Uniformity of Process Act,<sup>e</sup> passed in 1832, recognised and confirmed, while it abolished the fictions by which it was acquired.

Such being a brief history of the three Superior Courts of Common Law, it is time to give some account of the High Court of Chancery. This Court derived its jurisdiction from the Chancellor, a high officer of state from very early times, and a member of the Aula Regis. Always, until the time of Edward the Third, an ecclesiastic, the Chancellor was so closely associated with the counsels of the Sovereign as to obtain the title which he still bears of "Keeper of the King's Conscience." It was, perhaps, in this confidential capacity that the King, to whom, as the fountain of justice, appeals were brought from the courts of ordinary jurisdiction, used to refer his subjects to the Chancellor, thus giving rise to that branch of English law which is called equity. It was the more natural that the Chancellor should exercise a superintend-

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<sup>e</sup> 2 Will. IV. c. 39.

ing control over the Courts of Common Law, because from the Chancery issued the "original writs," by which all actions in the Courts of Common Law were commenced, and it is believed by many that the extraordinary or equitable jurisdiction of the Chancellor was only an extension of this ordinary jurisdiction. The nature of equity as distinct from common law may be gathered from the origin assigned to it. Just as, after a conviction for a criminal offence, an appeal may still be made to the clemency of the Sovereign, so we may imagine appeals made to the Crown from the decision of a civil action or the threatened prosecution of a civil right, and referred by him to the Chancellor. Probably in their origin these appeals were based rather on the partiality of the ordinary tribunals than on the alleged injustice of the law itself, but their scope may easily be imagined to have been by degrees extended. In determining these appeals the Chancellor was freed from the strict rules of the law, and professed to act according to the dictates of conscience, drawing in early times on that knowledge of the civil law which, as an ecclesiastic, he would possess. So unfettered was the discretion thus obtained that equity was said to vary from one Chancellor to another as much as the length of successive Chancellors' feet. In process of time, however, equity hardened into rules as definite and binding on the judge as the rules of law themselves, and the Chancellor was no longer able to give effect to individual opinion, but was bound

strictly to follow the decisions of his predecessors. The same kind of equitable jurisdiction, thus restricted, devolved on the Master of the Rolls, another judge in Chancery, who from a subordinate position in that Court gradually attained judicial power; on the Vice-Chancellors, the first of whom was made in 1811; on the Lords Justices of Appeal in Chancery, created in 1851; and on the two additional Vice-Chancellors rendered necessary in 1842 by the growth of the business of the Court.

Meanwhile the interference of the Chancellor had resolved itself into a formal procedure. In King Richard the Second's reign, John of Waltham invented the writ of subpoena, which commanded the defendant to appear "*et hoc sub pœnâ centum librarum nullatenus omittas*," and this writ up to recent times was the foundation of the proceedings. But what the Court of Chancery chiefly relied on for the enforcements of its decrees was always its process against the person. Without too roughly wounding the susceptibilities of the common law judges, by acting directly against them, it obtained a virtual control over their Courts by ordering a suitor, on the application of the person interested, to refrain or desist from enforcing his legal rights on pain of imprisonment. By this means it obtained a practically exclusive jurisdiction over such matters as mortgages and trusts, in which it took a different view of the rights of parties from the Courts of Common Law. The Court of Chancery also obtained jurisdiction over the restraining of wrongs,



the winding up of partnerships and the taking of accounts, which the Courts of Common Law neglected to assume, by means of its direct action upon the person ; and in the same way enforced an answer to written interrogatories, a convenient mode of eliciting evidence from an adversary, which brought much business to the Court of Chancery, although it was equally cognisable by the Courts of Common Law.

The remaining Courts now consolidated in the Supreme Court of Judicature are the Admiralty, Probate, and Divorce Courts. The Court of Admiralty derived jurisdiction from the Lord High Admiral, and was erected by Edward the First for the trial of maritime causes. The Probate Court succeeded in 1857 under the authority of a statute to the jurisdiction formerly exercised by the ecclesiastical Courts over the wills and intestacies of dead persons. The goods of persons dying without wills were anciently distributable "in pios usus," and the Church undertook this distribution ; afterwards usurping jurisdiction over wills, as the documents by which its title on an intestacy was superseded. In the same way and in the same year the Divorce Court succeeded to the authority of the ecclesiastical Courts over marriages, which were looked upon as religious contracts, with power, in addition, to decree the dissolution of a marriage, which until then could only be effected by an Act of Parliament. Proceedings in Divorce, however, are not called actions, and therefore that branch of the jurisdiction of the Supreme Court which is

derived from the Divorce Court only incidentally comes within the scope of these pages.

All these Courts are now consolidated, and their jurisdiction vested, in the Supreme Court of Judicature, which thus after centuries of separation re-unites the different branches of the ancient *Aula Regis*, and is established as the one Superior Court of justice in the country. It was necessary for the Judicature Acts, by which this result has been produced, to provide for the conflict of practice and principle which this consolidation would otherwise bring about in the new Court. The practice has been provided for by a new code of procedure contained in the schedule to the Judicature Act of 1875, which selects from the procedure in use in the consolidated Courts whatever appeared most conducive to the ends of justice for use in the Supreme Court of Judicature. It was necessary for this code to provide a new rule wherever the practice was conflicting; but it does not profess to be complete, and where silent, it is to be supplemented by the former practice used by the old Courts in similar cases. The judges of the Supreme Court, moreover, have by these statutes power already possessed by the judges of the former Courts, at any time to alter existing or make fresh rules for the regulation of the practice of the Court.<sup>d</sup> As to the conflict between the principles of law and equity, the Judicature Act of 1873 lays down certain rules of substantive law on particular subjects, and for the rest directs that

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<sup>d</sup> Jud. Act, 1875, s. 17.

in cases of conflict the rules of equity are to prevail.<sup>e</sup> This general supremacy of equity over common law maintains the state of things existing before the Act, not, as now, by express provision, but through the writ of injunction by which, as has been seen, equity was enabled to control the common law. The Supreme Court of Judicature is not the first court in England which has administered law and equity concurrently. The Court of Exchequer possessed from very early times an equitable jurisdiction, which, however, in cases between subject and subject it exercised separately from its common law jurisdiction, and which in 1842 was taken away from it, the two new Vice-Chancellors being appointed as a compensation. The abolition, however, did not affect the jurisdiction of the Court of Exchequer in revenue cases between the Sovereign and the subject, in which law and equity had always been concurrently administered, as was well pointed out by Chief Baron Pollock in a celebrated case.<sup>f</sup>

As the existing Courts were, on the 1st of November, 1875, consolidated into one Court, so the existing judges of the old Courts were transferred to the new Court. The Supreme Court of Judicature is divided permanently into two parts, Her Majesty's High Court of Justice and Her Majesty's Court of Appeal.<sup>g</sup> The High Court was on the 1st November, 1875, constituted of all the

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<sup>e</sup> Jud. Act, 1873, s. 25.

<sup>f</sup> *Attorney General v. Halling*, 15 M. & W. 687.

<sup>g</sup> Jud. Act, 1873, s. 4.

existing judges of the Court of Chancery, the Courts of Queen's Bench, Common Pleas, Exchequer, Probate, Divorce and Admiralty, being in all twenty-five judges. The Court of Appeal was then composed of only three judges exclusively assigned to it, that is the two existing Lords Justices of Appeal in Chancery and one newly-created Justice of Appeal, being supplemented from the members of the High Court by the Lord Chancellor, the chiefs of the former Common Law Courts, the Master of the Rolls, and the puisne judges as occasion might require. Since the 1st of November, 1875, a redistribution of the judges between the High Court and the Court of Appeal has taken place. The number of judges of the High Court was in 1876 diminished by three, and the judges of the Court of Appeal were increased by the same number. In 1877 one new justice was added to the High Court in the Chancery Division. Accordingly, the High Court of Justice now consists of twenty-three judges, that is to say, the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, the three Vice-Chancellors, the justice added to the Chancery Division, twelve of the puisne justices and junior barons of the former Common Law Courts, the Judge of the former Probate and Divorce Courts, and the Judge of the former Admiralty Court.<sup>h</sup> The Court of Appeal

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<sup>h</sup> Jud. Act, 1873, s. 5 ; App. Act, 1876, s. 15 ; Jud. Act, 1877, s. 2.

adds six judges to the complement of the Supreme Court, three of whom were, in 1876, taken from the puisne judges of the High Court and who are the "ordinary Judges of the Court of Appeal," but it can be supplèmented by the Lord Chancellor, the Chief Justice of England, the Master of the Rolls, the Chief Justice of the Common Pleas, and the Chief Baron, who are called *ex officio* judges of the Court of Appeal, and four other judges of the High Court, who are called "additional judges," and who are liable to be summoned by the Lord Chancellor as occasion may require;<sup>1</sup> but who, since the addition of the three ordinary judges, are not likely to be called on to attend frequently. The interchange of judges between the High Court and the Court of Appeal is further carried out by a power vested in the Lord Chancellor of requesting a judge of the Court of Appeal to act in the place of a judge of the High Court.<sup>1</sup> The offices of Lord Chancellor, of Chief Justice of England, of Master of the Rolls, of Chief Justice of the Common Pleas, and of Chief Baron of the Exchequer are retained, although the Courts with which their titles are associated have disappeared. The remaining judges of the High Court are for the future to be styled "Justices of the High Court," and the ordinary judges of the Court of Appeal to be styled "Lords Justices of Appeal,"<sup>2</sup> but the Vice-Chancellors and Barons appointed before the 1st of November, 1875, are to retain

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<sup>1</sup> Jud. Act, 1875, s. 4; App. Act, 1876, s. 15.

<sup>2</sup> Jud. Act, 1873, s. 51.

<sup>3</sup> Jud. Act, 1874, s. 7.

their titles.<sup>1</sup> All the judges, whether of the High Court or the Court of Appeal, appointed since the 1st November, 1875, are liable to go circuit.<sup>m</sup>

The office of Lord Chancellor still remains a political office, that is to say, it is held in legal phrase, "*durante bene placito*," and changes with successive ministries. We have seen that he is a member of the High Court and the Court of Appeal. He is also almost invariably a Peer, and since the House of Lords has sat as a Court of law during the recess of Parliament, his duties on the woolsack do not leave much room for his appearance in either of the lower Courts. The other judges hold their offices during good behaviour, subject to the power of removal by the Crown, on address by both Houses of Parliament. They cannot be members of the House of Commons, and have to take the oath of allegiance and the judicial oath.<sup>n</sup> A judge of the High Court must have been a barrister of ten years' standing. Fifteen years' standing as a barrister, or one year's standing as a judge of the High Court is required for an ordinary judge of the Court of Appeal, and no judge is now required to be a serjeant-at-law.<sup>o</sup> The judges exercise their jurisdiction either as divisional Courts composed ordinarily of two judges, or singly in Chambers where they decide points of practice, or singly in Court either with or without a jury.<sup>p</sup>

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<sup>1</sup> Jud. Act, 1873, s. 11.

<sup>m</sup> Jud. Act, 1873, s. 37.

<sup>n</sup> Jud. Act, 1875, s. 5.

<sup>o</sup> Jud. Act, 1873, s. 8.

<sup>p</sup> Jud. Act, 1873, ss. 39-44 ; App. Act, 1876, s. 17.

For the better distribution of business the High Court of Justice is divided into five Divisions, with names derived from the Courts consolidated, namely, the Chancery Division, the Queen's Bench Division, the Common Pleas Division, the Exchequer Division, and the Probate, Divorce, and Admiralty Division.<sup>a</sup> Subject to the exclusive assignment of certain business to each Division, being generally such business as the Court whose name it takes exclusively transacted,<sup>r</sup> to a power vested in the Lord Chancellor of transferring business from one Division to another less burdened with work,<sup>s</sup> and to a power to transfer by order from one Division to another where the action may more conveniently proceed,<sup>t</sup> the plaintiff chooses the Division to which he will assign his cause.<sup>u</sup> It is, however, essential to the new system that these Divisions should not be looked upon as Courts; and each judge, of whatever Division, is invested with the full jurisdiction of the High Court of Justice.<sup>v</sup> The judges are distributed among the Divisions, namely, six to the Chancery Division, the Lord Chancellor being President; five to the Queen's Bench Division, the Lord Chief Justice of England being President; five to the Common Pleas Division, the Lord Chief Justice of the Common Pleas being President; five to the Exchequer Division, the Lord Chief Baron of the

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<sup>a</sup> Jud. Act, 1873, s. 31.

<sup>r</sup> Jud. Act, 1873, s. 34.

<sup>s</sup> Ord. ii. 1, p. 330.

<sup>t</sup> Jud. Act, 1873, s. 36; Ord. ii. 2, p. 330.

<sup>u</sup> Ord. ii. 1, p. 250.

<sup>v</sup> Jud. Act, 1873, s. 39.

Exchequer being President; and two to the Probate, Divorce, and Admiralty Division, the senior judge being President.<sup>\*</sup> The business of each Division important enough to be brought before several judges is in general transacted by a divisional Court composed of judges belonging to that Division, but there is nothing to prevent a divisional Court composed, for instance, of judges of the Exchequer Division entertaining questions arising in a cause assigned to the Queen's Bench Division, except that so far as practicable one judge of the Division to which the cause is assigned is to be of the divisional Court which adjudicates upon it.<sup>†</sup>

Divisional Courts hitherto have always sat in London, but there is nothing to prevent them sitting elsewhere if occasion should require, somewhat after the manner of the Aula Regis before the Common Pleas were fixed at Westminster.<sup>\*</sup> Moreover, the claims of the provinces were recognised by the establishment of District Registries in seventy towns, where writs may be issued and routine business conducted under the control of a District Registrar whose jurisdiction is contemporaneous with that of the County Court holden in the town.<sup>\*</sup> The Court of Common Pleas at Lancaster and the Court of Pleas at Durham were also merged in the High Court of Justice,<sup>b</sup> and their

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<sup>\*</sup> Jud. Act, 1873, s. 31.

<sup>†</sup> Jud. Act, 1873, s. 41.

<sup>\*</sup> Jud. Act, 1873, s. 26.

<sup>\*</sup> Jud. Act, 1873, s. 60; Order in Council, 12 Aug., 1875.

<sup>b</sup> Jud. Act, 1873, s. 16.



District Registrars and prothonotaries utilized for the High Court.<sup>c</sup>

The distribution of the High Court into Divisions is of less importance to the judges than to the officers of the Court, who are more permanently attached to the respective Divisions.<sup>d</sup> The more important of the officers are the Masters, the Registrars, and the Chief Clerks. The Masters, fifteen in number, were transferred from the former Common Law Courts, and their duties are regulated by statute.<sup>e</sup> Their functions are to tax costs and to attend the Divisional Courts while sitting. They have also sometimes to examine the parties and witnesses before trial, and matters are constantly referred to them by the judges. They can take references where the action resolves itself substantially into a matter of account, and they transact in the first instance nearly all the business of a Judge at Chambers, subject to an appeal to the judge.<sup>f</sup> The twelve Registrars formerly attached to the Court of Chancery are now officers of the Supreme Court. Their duties are to attend in Court and take notes of the judgment, and afterwards to reduce it into formal shape. There are also seven Taxing Masters, formerly attached to the Court of Chancery, whose duty it is to tax costs. The Registrar of the former Admiralty Court and the four Registrars formerly attached

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<sup>c</sup> Orders in Council, 12 Aug., 1875; 9 Dec. 1876.

<sup>d</sup> Jud. Act, 1873, s. 77; Ord. lx., p. 344.

<sup>e</sup> 1 Vict. c. 30.

<sup>f</sup> Ord. liv., p. 334.

to the Court of Probate have duties similar to those of the Masters and the Registrars in Chancery. There are also twelve Chief Clerks, an office formerly attached to the Court of Chancery. They must have been solicitors, and their duty is to make orders and take accounts and inquiries in Chambers with an appeal to the judge. Their duties are regulated by the statute which abolished the office of Master in Chancery.<sup>a</sup> The Judicature Acts create a new class of permanent officers under the name of official referees,<sup>b</sup> of whom four have been appointed, and who are to sit *de die in diem*, as arbitrators, for the purpose of disposing of cases proper to be tried in this manner.

The barristers and serjeants-at-law are also looked upon as officers of the Court. Until the year 1834, the serjeants had an exclusive right of audience in the Court of Common Pleas, and anciently they were almost the only advocates in civil cases. So lucrative a profession tempted the cupidity of the ecclesiastics, although forbidden to interfere in secular pursuits; and the coif is said to have been invented to hide the tonsure of the priests who assumed it. As to the barristers, they were anciently called "apprentices to law," and occupied a rank inferior to that of the serjeants. One of the first of them who attained great legal eminence was the celebrated Edmund Plowden; and Sir Francis Bacon was the first king's counsel under the degree of sergeant. Barristers have to

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<sup>a</sup> 15 & 16 Vict. c. 80.

<sup>b</sup> Jud. Act, 1873, s. 83.

be admitted members of one of the four Inns of Court, and after a three years' probation as students must be called to the degree of barrister by the Benchers of their Inn, when they are entitled to practise at the bar of the Supreme Court. The right of the serjeants to practise exclusively in the Court of Common Pleas was, on the 25th of April, 1834, abolished by a royal warrant, which was subsequently, after solemn argument, decided to be invalid, and the serjeants resumed the exercise of their ancient privilege; but enjoyed it only for a short period, as by a statute passed in 1846 the Court was thrown open to all barristers.

The solicitors, a name formerly given to the practitioners in the Court of Chancery only, but now displacing altogether the name of attorney used in the former Common Law Courts, are also officers of the Supreme Court. A person must be duly admitted and enrolled as a solicitor before he can practise. Practising without being so admitted is an indictable misdemeanour. Previously to admission a solicitor must in general have served as an articled clerk for five years, but in cases of persons specially qualified this period is reduced to three and sometimes to four years.<sup>1</sup> Before a solicitor can practise he must obtain a stamped certificate enabling him so to do, otherwise he is not only subject to a penalty, but cannot recover his fees for business done while so uncertificated.

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23 & 24 Vict. c. 127, ss. 1-5.

Where two or more solicitors are in partnership each must take out a certificate. If a solicitor neglects to procure or renew his certificate for one whole year, an order of the Court is requisite, which is granted upon terms varying according to the circumstances. The Court, considering solicitors as its officers, exercises a superintendence over their professional transactions.

The Sheriff, also, so far as the execution of process is entrusted to him, is an officer of the Supreme Court, which frequently exercises its power by ruling or attaching him. Each sheriff is, for the greater convenience of business, obliged to have a deputy within a mile of the Inner Temple Hall.<sup>j</sup> The appointment of sheriffs<sup>k</sup> and the fees of their officers<sup>l</sup> are regulated by statute. When the sheriff happens to be personally interested in a suit, the discharge of his ministerial functions devolves upon the coroner: and if the coroner be also interested, persons are appointed by the Court called elisors.

Such being an outline of the history and constitution of the Supreme Court, it remains to say a few words of the periods at which it sits. Formerly this question turned on the division of the legal year into the four Terms of Michaelmas, Hilary, Easter, and Trinity, each containing at most twenty-four days. Almost every act of the Courts was either done or supposed to be done

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<sup>j</sup> 3 & 4 Will. IV. c. 42, s. 20.

<sup>k</sup> 3 & 4 Will. IV. c. 99.

<sup>l</sup> 7 Will. IV. & 1 Vict. c. 55.

during one of these periods. The inconvenience caused by this arrangement was lessened from time to time by Acts of Parliament allowing sittings in Banc to take place in vacation and by other relaxations of the strict law of terms. Finally the Judicature Acts abolished them altogether so far as the administration of justice is concerned,<sup>m</sup> and substituted for them four "sittings" still retaining the ancient names. These sittings are <sup>n</sup>:

<i>Sittings.</i>	<i>From.</i>	<i>To.</i>
Michaelmas	November 2 .....	December 21.
Hilary .....	January 11 .....	Wednesday before Easter.
Easter .....	Tuesday after Easter week	Friday before Whit Sunday.
Trinity .....	Tuesday after Whitsun week.	August 8.

These are the periods during which the business of the Court is in full operation, and it is provided that so far as is reasonably practicable there shall be continuous sittings for the trial of questions of fact in London and Middlesex.<sup>o</sup> The rest of the year is divided into vacations and days during which the offices are closed. The offices are closed on Sundays, Good Friday, Monday and Tuesday in Easter week, Whit Monday, Christmas Day, and the next following working day, and days appointed for fasts or thanksgiving.<sup>p</sup> The vacations are four. The Long Vacation, lasting from the 10th August to the 24th October, the Christ-

<sup>m</sup> Jud. Act, 1873, s. 26.  
<sup>o</sup> Jud. Act, 1873, s. 30.

<sup>n</sup> Ord. lxi. 1, p. 345.  
<sup>p</sup> Ord. lxi. 4, p. 346.

mas Vacation from 24th December to the 6th of January, the Easter Vacation from Good Friday to Easter Tuesday, and the Whitsun Vacation from the Saturday before Whit Sunday to the Tuesday after.<sup>q</sup> The days of the commencement and termination of the sittings and vacations are included in them.<sup>r</sup> The Easter Vacation, it will be observed, extends only to days during which the offices are closed, and the practical effect of vacation time during the other vacations is that although the offices are open they close earlier in the day and the staff of officials is reduced. It is, however, provided that there shall be always two Vacation Judges in readiness to hear applications requiring to be promptly or immediately heard.<sup>s</sup>

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<sup>q</sup> Ord. lxi. 2, p. 345.

<sup>r</sup> Ord. lxi. 3, p. 345.

<sup>s</sup> Ord. lxi. 5-7, p. 346.

## CHAPTER II.

THE FORM OF THE ACTION AND OTHER  
PRELIMINARIES.

THE history and constitution of the Court in which the action is commenced having been thus stated, the next consideration is the action itself. Assuming that the proposed plaintiff has suffered a civil injury, the first question for him is the form of the action which he should institute in order to obtain redress.

In ancient times the "form of action" was a question of vital importance to the plaintiff who if he chose the wrong form was liable to be defeated altogether. Strictness in the use of forensic formulæ is a characteristic of the early legal history of most countries, and in England it originated in the practice of commencing all actions by "original writs." "Non potest quis," says Bracton, "sine brevi agere." These writs which were addressed to the sheriff of the county and ordered him to enforce the appearance of the defendant in a Superior Court issued, as has already been said, out of the Court of Chancery, and were couched in certain unvarying forms of words. The suitor had his choice among these writs, and if he did not find a writ to fit his

grievance, he was altogether without a remedy. Some relaxation of this rule was introduced by the Statute of Westminster the Second which provided that "as often as it shall happen in Chancery that in one case a writ is found, and in a like case falling under the same right and requiring like remedy no writ is found, the Clerks in Chancery shall agree in making a writ." These writs being made in "*consimili casu*" with the older forms were the origin of the large class of actions called "*case*." The strictness of the rule as to forms of action often led to great injustice, and the Common Law Procedure Act, 1852, abolished the original writ in most actions as well as the technicalities of pleading which required a literal adherence to the peculiar forms of expression characteristic of each action. By the Common Law Procedure Act, 1860, the rest of the original writs were abolished, but a knowledge of the forms of action is still essential, both for reasons of substance and of procedure. The large class of actions which were prosecuted in the former Common Law Courts have in each case one of the ancient original writs, or one of the analogous writs issued under the authority of the Statute of Westminster the Second, as a precedent. If no such precedent exist, and there is no ground for the interference of a Court of Equity, however grievous the damage a man may have suffered, there is no legal remedy for him, it being obvious that without well-recognised causes of action the law would fall into a most inconvenient state of vague-



ness. The forms of action are thus a valuable guide in determining whether a civil injury has been sustained, and they also play an important part in the procedure by which civil injuries are redressed. The Judicature Acts now require a short statement of the cause of action to be endorsed on the writ of summons,<sup>a</sup> thus to some extent reverting to the practice of the original writ; and the periods within which an action may be brought as well as many other regulations of procedure have reference to the forms of action, or, to use a more modern phrase, the classes of actions which the law permits to be brought.

The forms of action which the Supreme Court inherits from the Courts of Common Law are divided into three heads—real, mixed, and personal. “Real actions” are brought for the recovery of land or real property only; “mixed actions” for the recovery of real property, and also damages against the party detaining it; “personal actions” for the recovery of personal property, or, as is the more usual case, of damages for some injury to the person or the property.

In primitive times the right to land was the staple subject of litigation, and therefore real and mixed actions were the most important branch of civil procedure. Real actions were extremely numerous, and, although of rare practical occurrence in modern times, existed until 1833. In that year they were all abolished<sup>b</sup>

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<sup>a</sup> Ord. ii. 1, p. 250.

<sup>b</sup> 3 & 4 Will. IV. c. 27, s. 36; C. L. P. Act, 1860, s. 26.

except three, namely "writ of right of dower," "dower unde nihil habet" and "quare impedit," the first two of which are brought by a widow to compel the due assignment of her dower—the former being used when the widow has received part of her dower, and the latter when she sues for the whole—and the third, by a person who complains that he has been improperly deprived of ecclesiastical patronage.

Of mixed actions the most important has always been the action of "ejectment." It was in its original form an action of trespass, in which damages were claimed, but by means of an elaborate fiction it became an action by which persons might recover the possession of land wrongfully withheld from them. The fiction consisted mainly in the creation of John Doe as the "nominal plaintiff," and Richard Roe as the "casual ejector," the real parties to the action being the claimant who was looked upon as the lessor of Doe, and the person in possession who was allowed to take Roe's place. Under the Common Law Procedure Acts this time-honoured fiction disappeared, but the action was placed on a footing peculiar to itself. Its place is supplied under the Judicature Acts by the action for the recovery of land. The term ejectment is still used as the short title for this form of action, but it now follows the general law applicable to actions except in certain particulars arising out of the nature of the claim.

The class of personal actions is far the most

extensive. It comprehends all claims of redress for personal violence or aggression; all demands founded upon contracts between man and man; all complaints for injuries done to personal property, and also for injuries to real property, excepting where the plaintiff seeks to recover land itself. Personal actions are divided into two great classes:—1. Actions “ex delicto,” or founded upon “tort.” 2. Actions “ex contractu,” or founded upon contract: and these are again subdivided into several subordinate species. Under the class of actions ex delicto or of tort are comprehended,—

*Trespass*, which lies for injury either to real or personal property, or to the person, accompanied by actual and immediate contact. The most important examples of this class of actions are assault, false imprisonment, and trespass to land.

*Case*, or *trespass on the case* which lies for injuries either to real or personal property, or to the person, not accompanied by immediate contact. This is a very large class of actions derived as has already been pointed out from the practice of granting original writs “in consimili casu” with the more ancient writs which in personal actions were mostly framed in trespass. As a familiar instance of the distinction between trespass and case, suppose a person throw a log of wood on the highway, and by the act of throwing another person is injured, the appropriate remedy would be trespass. But if the log reach the ground and remain there, and some one fall over it, the remedy

is case, as the injury is not immediately consequent on the act. The commonest forms of this kind of action are defamation, negligence, seduction, nuisance, withdrawal of support to land, obstruction of ways, watercourses and lights, and infringement of rights of sporting, patent, copyright, and trade mark.

*Trover*, which is a variety of the action on the case, and is adopted when it is alleged that goods and chattels of the plaintiff have been converted to the defendant's use, as by his selling them or otherwise dealing with them. It is so called because the original writ, and afterwards the declaration, stated that the defendant found the goods in question, and converted them to his own use.

*Detinue*, which lies where a party claims the specific recovery of goods and chattels or deeds and writings detained from him. In this action the judgment was formerly for the recovery of the thing detained or its value, so that the defendant might retain the thing, by paying the value assessed; but there is now power to order a "writ of delivery" to issue for the return of the chattel detained, without giving the defendant the option of paying its value; and if the chattel cannot be found, the defendant's lands and goods may be distrained until it be returned.\* The plaintiff, however, may have its assessed value at his option.

*Replevin*, which is in form an action for damages for the illegal taking and detaining of

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\* Ord. xlix., p. 328; C. L. P. Act, 1854, s. 78.

goods and chattels. It is most usual in cases of landlords distraining on their tenants' goods for rent and in cases of cattle distrained "damage feasant" to answer for injury to crops, but it also lies in most other cases where goods are illegally taken. The action is based on the ancient writ "replegiari facias" directed to the sheriff commanding him to deliver the distress to the owner, and afterwards to do justice in the matter in the County Court. By the Statute of Marlbridge the sheriff was authorised to replevy goods without the writ, a bond being entered into by the replevisor to prosecute an action, and if unsuccessful, to return the goods. The Registrar of the County Court in which the distress is taken now grants the replevin and approves the bond. It was always usual in cases of importance to remove the action from the County Court to a Superior Court, and it may now be brought in the High Court whenever the title to some corporeal or incorporeal hereditament is in question or the rent or damage exceed £20.<sup>d</sup>

*Actions ex contractu*, or founded on contract, which so far as they are derived from the original writs must be looked upon as varieties of the action on the case are,—

*Covenant*, which is brought to recover damages for the breach of a promise made by deed.

*Debt*, which is generally brought, as its name imports, for the recovery of a sum of money payable in respect of a direct and immediate liability

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<sup>d</sup> 19 & 20 Vict. c. 108, s. 65; C. L. P. Act, 1860, ss. 22-24.

of a debtor to a creditor, whether due by specialty or simple contract. It also lies in all cases in which by Act of Parliament one party has a right to recover a sum certain from another. The most important of the numerous money claims are for goods sold, money lent, work done, money received for the plaintiff, claims on bills of exchange and promissory notes, and calls on shares. This class of actions corresponds with claims for liquidated sums.

*Scire facias*, which lies to enforce certain judgments, recognizances, that is, acknowledgments of indebtedness entered on the records of a Court of law, and other obligations of record. A judgment which has remained unenforced for a length of time is not now revived by *scire facias*, but by a simpler process to be hereafter explained.

*Assumpsit*, which lies to recover damages for the breach of any simple contract, that is, a contract not under seal. Thus it lies for non-delivery and non-acceptance of goods, breach of warranty, breach of promise of marriage, and many cases of negligence arising out of contract.

Two other forms of action *ex contractu*, viz., "account" and "annuity," employed for purposes which their names imply, are now obsolete, the former being merged in the more comprehensive process for obtaining an account used in the Court of Chancery, and the object of the latter being attained by simpler forms of action.

Something must also be said of the statutory "action of mandamus" given in 1854 to the Com-

mon Law Courts to compel the performance of any duty in the fulfilment of which the plaintiff is personally interested.<sup>o</sup> A very limited construction has been given to the words of the statute, and the action has been looked upon as rather in aid of the prerogative writ of mandamus, which is obtained by motion in the Queen's Bench Division to enforce the performance of public duties, than as a means for compelling the specific performance of civil obligations.

The action of mandamus is the less important now that in all forms of action a claim may be made for a "mandamus," a process for compelling the specific performance of an obligation, whether arising from contract or tort, borrowed from the "mandatory injunction" of the Court of Chancery. Very closely allied to this process is its converse, the "injunction," which may be claimed in any action by a party who desires his opponent to be ordered not to do, or not to continue to do, an act which is alleged by him to be an infringement of his rights. This remedy in a limited form was conferred on the Common Law Courts in 1854, but now by the effect of the consolidation of practice, and the wide language of the 8th sub-section of the 25th section of the Judicature Act, 1873, the High Court of Justice has even larger powers to order an injunction, whether on terms or absolutely, than the Court of Chancery formerly possessed.<sup>f</sup>

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<sup>o</sup> C. L. P. Act, 1854, ss. 68-74.

<sup>f</sup> *Beddow v. Beddow*, 47 L. J. Ch. 588 ; L. R. 9 Ch. 89.

The actions over which the Supreme Court now obtains jurisdiction by reason of its absorption of the Court of Chancery, are not classified as forms of action strictly so called. The remedies available in Chancery were never stereotyped into technical formulæ as happened to the common law actions in the original writs. Still the important branch of actions which may be called Chancery actions, may easily and conveniently be reduced into classes. The most important of them are the *administration action*, in which a creditor, a legatee or other interested person, claims to have the estate of a deceased person administered under the control of the High Court; the *action of account*, in which a partner, mortgagee, or other person, claims to have a debtor and creditor statement taken of the dealings between himself and another person who is under an obligation to furnish him with an account; the action for *dissolution of partnership*, in which a partner claims to be relieved from the contract as against his fellow; the *foreclosure action*, by which a mortgagee may compel a mortgagor either to pay principal, interest, and costs, or to give up all claim to the mortgaged property; the *redemption action*, by which the mortgagor offers to pay principal, interest, and costs, and claims to have the mortgaged property reconveyed to him; the *action for portions*, by which claim is made to have the sums of money provided for younger children raised out of the estate; the *partition action*, where one of several owners claims to have the land divided;



and the actions for the *execution of trusts*, the *cancellation* or *rectification* of deeds, and the *specific performance* of contracts, the object of which is implied in their names.

The forms of action derived from the Probate Court are few and simple. They are the action for *propounding a will in solemn form*; the *interest action*, where the plaintiff claims the grant of letters of administration as one of the next of kin of the deceased; and the *revocation action*, in which it is sought to revoke a probate granted in common form or letters of administration. In these actions the validity of a will as a whole, whether in respect of the capacity of the testator or its due execution, is put in issue, or the claim of a person to be one of the next of kin of the deceased is determined, but the greater part of the Probate business of the High Court is transacted upon motion and not by action.

The characteristic of the most important actions to which the Supreme Court has succeeded from the Admiralty Court is that the proceeding is not against a person but a ship, cargo, or freight, in order to enforce a maritime lien. Maritime lien is enforceable in the action of *damage* by collision or otherwise, whether to ship or cargo; the action on a *bottomry bond*, by which instrument money is lent at a high premium, on the chance of the ship arriving safely; the *respondentia* action, in which the cargo alone has been pledged on the same terms; the action of *possession*, when a claim is made, whether by

owner, mortgagee, or other person to be possessed of the ship; the action for *salvage*, or for *towage*, when reward is claimed for assisting a vessel in distress, or for towing her; the action for *pilotage*; the action for *masters and seamen's wages* in respect of service on board the ship; and the action for *necessaries* supplied to the ship in port.

The plaintiff having decided on the kind of claim, or combination of claims, he proposes to prosecute in the Supreme Court, his next care is to see whether his right of action has been affected by lapse of time. This mainly depends on an important series of Acts of Parliament called the "Statutes of Limitation;" statutes, the policy of which is to prevent litigation, to quiet people's rights, and to set their minds at ease by protecting them against old claims. Without this protection claims might start up after the evidence has been lost, which, had they been brought forward earlier, would have rebutted them.

The times of limitation are as follow:—

*Twenty* years are the limitation for actions of debt or covenant founded on deeds or recognisances, and also for actions brought before the 1st January, 1879, to recover any land or rent, that is, the right to receive rents out of land, also for actions of redemption brought before the same date, counting from the time when the mortgagee took possession.<sup>s</sup>

*Twelve* years for actions brought after the 1st January, 1879, to recover any land or rent, or any

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<sup>s</sup> 3 & 4 Will. IV. c. 42; 3 & 4 Will. IV. c. 27.

sum secured by mortgage, judgment or lien charged on land, also for any legacy, and to redeem a mortgage.<sup>h</sup>

*Six* years are the limitation for actions of trespass to land, detinue, trover, case generally, assumpsit, debt without specialty, arrears of rent, and interest payable out of land.<sup>i</sup>

*Four* years are the limitation for trespass to the person or goods, and *two* years for slander,<sup>j</sup> which period is also the limitation for actions on penal statutes brought by the party aggrieved. Actions on penal statutes brought by a common informer have *one* year's limitation,<sup>k</sup> and so have actions brought to compensate the families of persons negligently killed.<sup>l</sup>

If the party entitled to bring the action be a married woman, an infant under age, or insane, further time is allowed. If the intended defendant be beyond seas when the cause of action accrues, the time does not begin to run till his return,<sup>m</sup> but in the case of joint debtors, the time begins to run as against those not beyond seas from the time of the accrual of the cause of action, and not from the time those beyond seas return.<sup>n</sup>

In all the cases of disability or exemption in which the operation of the statute is temporarily suspended, there prevails the general rule, that if

<sup>h</sup> 37 & 38 Vict. c. 57.

<sup>i</sup> 21 Jac. I. c. 16; 3 & 4 Will. IV. c. 27, s. 42.

<sup>j</sup> 21 Jac. I. c. 16.      <sup>k</sup> 31 Eliz. c. 5; 3 & 4 Will. IV. c. 42.

<sup>l</sup> 9 & 10 Vict. c. 98.      <sup>m</sup> 4 & 5 Anne, c. 16.

<sup>n</sup> 19 & 20 Vict. c. 97, s. 11.

the disability be once removed, but for one single instant, so that the time of limitation once begins to run, nothing can afterwards stop it. At common law the operation of a Statute of Limitation was not affected by the cause of action being fraudulently concealed from the party entitled to bring the action, but the equitable rule introducing an exception in cases of fraud now prevails in the Supreme Court.

It is important to recollect that these Statutes of Limitation, though they prevent an action from being brought after the time of limitation has elapsed, do not in general destroy the right on which such action would have been founded. They take away, as is commonly said, not the plaintiff's right, but his remedy; so that, if he can in any way avail himself of his right without bringing an action, he is, even after the time of limitation has expired, at liberty to do so. Thus, a solicitor has but six years to bring an action on his bill, and, if he allow that time to expire, he cannot sue for its recovery. But still, if he have any of his client's papers in his custody, he will retain his lien upon them until his claim is satisfied, even though the six years have elapsed. A written acknowledgment of the debt or right in general revives the action from the date of the acknowledgment.

In order to prevent a Statute of Limitation from barring a right of action, it is usual to sue out a writ, and thus commence the action within the limited time, and then, by suing out other

writs, continue the proceedings, so as to keep the action alive down to the time when it becomes expedient actually to serve the defendant. This proceeding was formerly a matter of course, but now a writ cannot be renewed without leave obtained upon a summons.<sup>o</sup>

Having settled the form of his action and considered whether it is unaffected by the Statutes of Limitation, the plaintiff will proceed to shape his action further by determining the parties proper to sue and to be sued. This was formerly a question of great importance, as a mistake at this point, whether in joining too many or too few persons either as plaintiffs or defendants, was often fatal to the whole action. The Judicature Acts, however, relieve the plaintiff from many anxieties on this score, and claims may now be made, either by or against several persons as parties jointly, severally, or in the alternative. If all the parties affected have not been joined, judgment may be claimed against or in favour of those who have been joined, and full powers of amendment whether by way of addition or substitution of parties are conferred.<sup>p</sup>

Partners may now sue and be sued in the name of the firm.<sup>q</sup> Corporations sue and are sued in their registered or corporate title, and there are certain associations, especially banking companies,<sup>r</sup> provided by statute with a public officer as their

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<sup>o</sup> Ord. viii. 1, p. 258.

<sup>p</sup> Ord. xvi. p. 271.

<sup>q</sup> Ord. xvi. 10, p. 273.

<sup>r</sup> 7 Geo. IV. c. 46; 1 & 2 Vict. c. 96; 5 & 6 Vict. c. 85.

litigant representative. A hundred, although not a corporate body, is sometimes though rarely sued for damage done feloniously, as in a riot, unless the damage be no more than 30*l.*, in which case, a summary remedy is provided. No individuals are named as defendants but the inhabitants of the hundred generally; and the writ is served upon the high constable, who gives notice of it to two justices acting for the hundred.<sup>a</sup> Trustees may sue and be sued as representing the trust without joining beneficiaries;<sup>t</sup> and where there are numerous parties with the same interest one or more may sue, or by leave may defend for the rest.<sup>u</sup> Thus a creditor may institute an administration action on behalf of himself and all other creditors.

There are certain persons who, through an incapacity presumed by law, cannot be made parties to an action in the ordinary way, but a peculiar practice applies to them. These are infants, married women, and lunatics. Their incapacity arises from the assumption that they are not able to look after their own litigious interests, nor to appoint a solicitor to do so for them.

Infants sue in the Supreme Court by their "next friend," and defend actions by their "guardian ad litem,"<sup>v</sup> as formerly in the Court of Chancery. The next friend or guardian ad litem of an infant is in general his legal guardian, but any person may be put forward for the purpose.

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<sup>a</sup> 7 & 8 Geo. IV. c. 31.

<sup>u</sup> Ord. xvi. 9, p. 273

<sup>t</sup> Ord. xvi. 7, p. 272.

<sup>v</sup> Ord. xvi. 8, p. 272.

In actions by or against a wife, except by special leave, the husband must be in general joined with the wife, whether as plaintiff or defendant, when the cause of action would survive to or against the wife. Married women have, however, been granted a certain degree of statutory emancipation, so that in some cases they may bring actions without their husbands and without next friends. By the Married Women's Property Act, 1870,<sup>x</sup> a married woman may maintain an action in her own name for the recovery of any wages, earnings, money, and property declared by the Act to be her separate property, or of any property which belonged to her before marriage, and which her husband has, by writing under his hand, agreed with her shall belong to her after marriage as her separate property.

Moreover by the Act for establishing the Court for Divorce and Matrimonial Causes,<sup>y</sup> a wife deserted by her husband may obtain from a magistrate a protection order, by which her property and earnings are protected against her husband or his creditors, or any person claiming under him. She can thereupon sue in respect of her property as if she were a feme sole; and during the continuance of the order and the desertion the wife is deemed in the like position in all respects with regard to property and contracts, and suing and being sued, as she would be if she obtained a decree of judicial separation. By the same Act a

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<sup>x</sup> 33 & 34 Vict. c. 93, s. 11.

<sup>y</sup> 20 & 21 Vict. c. 85, ss. 21, 25, 26.

judicial separation between husband and wife may be decreed in certain cases; and, in case of a judicial separation the wife is, from the date of the decree, and whilst the separation continues, considered as a feme sole with respect to property of every description which she may acquire, or which may come to or devolve upon her. In every case of a judicial separation the wife is considered as a feme sole for the purposes of contract, wrongs, and injuries, and suing and being sued in any civil proceedings. These provisions respecting the property of a wife who has obtained a decree for judicial separation or an order for protection, are also extended to property to which the wife becomes entitled as executrix.

In cases where these Acts of Parliament do not apply, a married woman sues in respect of separate property by her next friend except by special leave,<sup>\*</sup> and not in conjunction with her husband, whose interests are presumed to be adverse to her separate estate, and who must be made a defendant in the action. The general rule for a wife suing or being sued is, however, subject to the provision that by leave she may sue or defend without her husband or next friend on giving, if required, security for costs.

A lunatic, that is, a person legally declared to be of unsound mind by inquisition, sues and defends by his committee with the sanction of the Court of Lunacy. A person of unsound mind

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<sup>\*</sup> Ord. xvi. 8, p. 272.

<sup>\*</sup> Ord. xvi. 8, p. 272.



who has not been so legally pronounced sues by next friend and defends by guardian.<sup>b</sup> The next friend, whether of an infant, married woman, or lunatic, must give a written authority to the solicitor to take the proceedings.

Formerly it was a strict rule that only one cause of action could be made the subject of an action at law. This rule has now been modified so that with certain exceptions any number of causes of action may be joined subject to severance if they cannot be conveniently disposed of together. Thus an action of libel has been held to have been well brought by eight plaintiffs together, although there was no joint damage.<sup>c</sup> And there seems nothing either in the law of parties or causes of action to prevent several persons, for example, injured in one railway accident, or several shareholders complaining of a fraudulent prospectus, joining in one action, provided that no inconvenience in trying it is caused by such combination. The exceptions are that no claims but those in respect of mesne profits, arrears of rent, and damages for breach of covenant, arising out of the property in question, can be joined with a claim for the recovery of land without leave, nor without leave can claims by a trustee in bankruptcy be joined with claims by him in any other character. On the other hand, claims by or against a husband in respect of his wife may be joined with claims by

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<sup>b</sup> Ord. xviii. p. 278.

<sup>c</sup> *Booth v. Briscoe*, L. R. 2 Q. B. Div. 496.

or against him individually, and claims by or against an executor or administrator as such may be joined with claims by or against him individually, these latter being claims arising out of his administration of the property, although as accruing since the death of the deceased person he is personally concerned in them.<sup>d</sup>

There are certain cases in which preliminary steps must be taken before the writ in an action is issued. Thus, if the action be by a solicitor for the recovery of his bill of costs, he must deliver a signed bill of costs a calendar month before the commencement of his action, but a judge is empowered to authorize the commencement of an action before the expiration of the month, on proof that there is probable cause for believing that the client is about to quit England.<sup>e</sup>

There are also many cases in which notice of action must be given to the defendant before it is brought, in order to enable him, if he please, to tender amends. This protection is frequently extended to a person acting in a public capacity, in respect of a matter done by him in the execution of his duty. Thus, no action can be commenced against a justice of the peace for anything done by him in the execution of his office until after notice in writing, which must clearly state the cause of action, and the Court in which the action is intended to be brought, and must have indorsed upon it the name and place of abode

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<sup>d</sup> Ord. xvii. p. 276.

<sup>e</sup> 6 & 7 Vict. c. 73, s. 37.

of the party intending to sue, or of his solicitor.<sup>f</sup> There are numerous other Acts of Parliament which require notice of action to be given. Judges and officers of the County Courts, officers of the army, navy, marines, customs and excise, and many others, are entitled to such notice for matters done in their respective offices.

In general, a person is entitled to notice of action under one of these statutes when he honestly believed in the existence of facts which, if they had existed, would have afforded a justification under it.<sup>g</sup> To establish uniformity it is provided that in all cases where notice of action is required, it shall be given one calendar month at least before any action shall be commenced.<sup>h</sup>

If an action be brought against a constable, or anyone acting in his aid, for anything done in obedience to the warrant of a justice of the peace, a demand in writing for the perusal and a copy of the warrant, signed by the plaintiff or his solicitor, must be made or left at his usual place of abode.<sup>i</sup> The effect of this provision is, that, if the demand be not granted within six days, the plaintiff may commence his action against the constable alone; but, if it be granted within the six days, he cannot sue the constable without joining the justice who made the warrant as a co-defendant, and then the mere production and proof of the warrant at the

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<sup>f</sup> 11 & 12 Vict. c. 44, s. 9.

<sup>g</sup> *King v. Chamberlain*, 40 L. J. C. P. 273; L. R. 6 C. P. 474.

<sup>h</sup> 5 & 6 Vict. c. 97, s. 4.

<sup>i</sup> 24 Geo. II. c. 44, s. 6.

trial will entitle the constable to a verdict, though if a verdict be found against the justice, he will have to pay to the plaintiff not only his costs in the action, but also the costs which the plaintiff is liable to pay to the constable.

Finally, although in strict law a suitor is entitled to issue a writ without any notice to the person he sues, yet out of courtesy it is the universal practice to write a letter before action, threatening legal proceedings unless the claim is satisfied.

## CHAPTER III.

### THE WRIT OF SUMMONS AND APPEARANCE.

HAVING disposed of these preliminary considerations we now arrive at the commencement of the action itself, the first step in which is the writ of summons, the most familiar kind of legal process.

Process may be defined as a form of proceeding taken in a court of justice for the purpose of giving compulsory effect to its jurisdiction. The process of the Supreme Court of Judicature consists of writs. Writs are letters missive from the sovereign, commanding the doing or forbearing of some act. Thus, a writ of mandamus issues, as its name imports, to command the performance, a writ of prohibition to command the forbearance, of an act. Writs are always directed to the person on whom the command is imposed: they are always witnessed or "tested," in the name of some person appointed for that purpose by law. A very important class of writs has always been those by which a civil action is commenced and an appearance enforced.

Writs of this kind were in former times extremely numerous, and subject to rules of an

extremely complicated nature, a large portion of every book of practice being devoted to their explanation. That old and inconvenient system was, however, abolished, and a new system gradually established by the Uniformity of Process Act,<sup>a</sup> by the Common Law Procedure Act, 1852, and lastly by the Judicature Acts. Under the provisions of these Acts of Parliament all actions in the Superior Court are now commenced by writ of summons.<sup>b</sup>

A writ of summons is a letter missive from the sovereign, issued at the instance of a plaintiff in a civil action for the purpose of compelling the defendant to appear and answer the claim on pain of judgment being given against him in his absence. The form of a writ of summons is given as Form 1 in the Appendix to this book,<sup>c</sup> and it consists of the body of the writ and the memoranda which appear on the face of the writ, and the indorsements which appear on the back.

The body of the writ is headed with the date of the year in which it was issued, together with a letter and number to identify it in the records of the Court. It next contains the "title," that is the words, "In the High Court of Justice," followed by the name of a Division, and if that Division be the Chancery Division, the name of a judge thereof and the names of the plaintiff and defendant "between" whom the action is expressed to be. It is directed to the defendant, whom it commands

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<sup>a</sup> 2 Will. IV. c. 39.

<sup>b</sup> Ord. i. 1, p. 249.

<sup>c</sup> Ord. ii. 3, p. 250.

within eight days after service to enter an appearance at a certain place, and gives him notice that in default of appearance the plaintiff may proceed to judgment. The body of the writ terminates with the name of the Lord Chancellor as a witness, and the date of the day of its issue.<sup>d</sup>

The memoranda consist, first, of a direction to the plaintiff to serve the writ within twelve months, and secondly of an intimation to the defendant where he may enter an appearance.

The indorsements are of three kinds. First, the "indorsement of claim," being a brief statement of the claim in the action, in order that the defendant may know what the suit is about.\* Secondly, the "indorsement of address," that is, the name and place of business of the solicitor, or firm of solicitors, who issue the writ, if it be issued by a solicitor, also of the principal solicitor, if issued by a solicitor acting as agent only, and also the address of the plaintiff in whose name it is issued, in order that the defendant may know accurately who his adversary is, and who is his adversary's legal adviser through whom he may treat.<sup>f</sup> The indorsement of address must also, if the solicitor's place of business do not answer the purpose, contain an "address for service" for the interchange of the successive documentary proceedings in the action, within the three miles' radius of Temple Bar, which comprehends the legal quarter of

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<sup>d</sup> Ord. ii. 8, p. 251.

\* Ord. ii. 1, p. 250.

<sup>f</sup> Ord. iv. 1, p. 253.

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London. If the writ is not issued by a solicitor the plaintiff must still more clearly identify himself by indorsing his place of residence and occupation by way of address, and also an address for service if his residence do not answer that purpose.<sup>h</sup> The third indorsement is the "indorsement of service," made after the writ is issued by the person who serves the writ inserting the date at which it was served in the space provided.<sup>i</sup>

If the defendant have reason to doubt that the writ is issued with the responsibility of the solicitor whose name appears on its back, he may call on the solicitor to declare whether the writ was issued by his authority. If not so issued all proceedings are stayed until the leave of a judge to proceed is obtained.<sup>k</sup>

A modification must be made in certain particulars when the writ is issued out of a District Registry, which may be done in any action except a Probate action.<sup>l</sup> On a Registry writ the place assigned for the appearance of the defendant must be the office of the Registry if the defendant either reside or carry on business within the district.<sup>m</sup> If the defendant neither reside nor carry on business within the district the place of appearance must be expressed to be either the office of the Registry or the London office, at the defendant's option.<sup>n</sup> In a Registry writ there must, if the plaintiff suing in person, or the plaintiff's

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<sup>h</sup> Ord. iv. 2, p. 253.

<sup>i</sup> Ord. vii. 1, p. 258.

<sup>k</sup> Ord. v. 3, p. 255.

<sup>l</sup> Ord. ix. 13, p. 261.

<sup>m</sup> Ord. v. 1, p. 254.

<sup>n</sup> Ord. v. 2, p. 254.



solicitor, have his address outside the district, be an address for service within the district.<sup>o</sup>

Such being a skeleton form of a writ of summons, the next consideration is how to fill up the blanks in order to produce a writ practically applicable to a particular case.

The first most important step is to fill in the name of the Division to which the action is assigned. By so doing the plaintiff chooses one of the Divisions, or branches of the High Court now, as has been explained, the sole remnants of the seven amalgamated courts. All the further proceedings in the action will be entitled and taken in this Division.<sup>p</sup> As a general rule, the plaintiff may choose what division he please, but if the action be for (1) the administration of a dead person's estate, (2) the dissolution of a partnership or the taking of accounts, (3) the redemption or foreclosure of a mortgage, (4) the raising of portions and other charges out of land, (5) the sale of property subject to a lien, (6) the execution of a trust, (7) the rectification or cancellation of a written instrument, (8) the specific performance of a contract respecting real estate, (9) the partition or sale of real estate, (10) the wardship of infants and the care of their estates, the Chancery Division must be named in the writ.<sup>q</sup> These are actions in which the former Court of Chancery had practically exclusive jurisdiction, and they are retained

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<sup>o</sup> Ord. iv. 3, p. 254.

<sup>p</sup> Jud. Act, 1875, s. 11, (1).

<sup>q</sup> Jud. Act, 1873, s. 34, (3).

in the Chancery Division to which the judges of the Chancery Court have been transferred. In the same way actions over which there was formerly exclusive jurisdiction in the Court of Probate, that is, where the validity of wills or the grant of letters of administration is concerned, or in the Court of Admiralty, that is, where the ship, cargo, or freight, is attached, must be assigned by the writ to the Probate, Divorce, and Admiralty Division. In respect of actions of the common law type the choice of the plaintiff is almost unlimited, but the ancient real actions of dower and *quare impedit* already referred to must only be assigned to the Common Pleas Division.<sup>r</sup> If the plaintiff assign his action to the Chancery Division, he must further assign it to a particular judge by naming him in the title of the writ. He may choose either the Master of the Rolls or one of the three Vice-Chancellors, at his option.<sup>s</sup> He must not, however, assign his action to the junior judge attached to the Chancery Division, as this judge has at present no staff of clerks constituting an administrative branch of the Division, and causes are transferred to him for purposes of trial only.<sup>t</sup> If the writ be issued out of a District Registry the name of the registry should be added.<sup>u</sup>

Having assigned his action to a Division the

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<sup>r</sup> Jud. Act, 1873, s. 34; Ord. v. 4, p. 255.

<sup>s</sup> Ord. v. 4, p. 255.

<sup>t</sup> Order of Lord Chancellor, 19 June, 1877.

<sup>u</sup> Ord. v. 8, p. 256.

plaintiff's next care is with the indorsements of claim. These are of three kinds, that is, the "general indorsement," the "special indorsement," and the "indorsement of debt and costs." A brief indication of the cause of action for which the plaintiff is suing, as, for instance, that his claim is for damages for an assault, must be given in all actions as a general indorsement.<sup>v</sup> The Appendix of Forms (A) given in the Judicature Act of 1875, provides forms of general indorsement for all the most usual actions,<sup>w</sup> and an example of a general indorsement is given in Form 1 to the Appendix in this book. If the plaintiff sue in a representative capacity he must also indorse the fact on the writ,<sup>x</sup> and in Probate actions the indorsement must show the character in which the plaintiff sues.<sup>y</sup>

The special indorsement is applicable to cases of liquidated demand only, and is optional in the plaintiff. A liquidated demand arises in an action of debt, when the defendant is charged with a promise to pay so many pounds, shillings, and pence, or it is alleged that there is an agreement between plaintiff and defendant for the payment of a sum of money, and the amount either resolves itself into a mere matter of calculation, or has been left to be determined by what is reasonable. When the claim is of either of these classes the plaintiff may specially indorse his writ, that is, may

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<sup>v</sup> Ord. ii. 1, p. 250 ; Ord. iii. 1, 2, p. 251.    <sup>w</sup> Ord. iii. 3, p. 252.

<sup>x</sup> Ord. iii. 4, p. 252.    <sup>y</sup> Ord. iii. 5, p. 252.

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set down the items of the claim, identified, as far as consistent with brevity, by description and dates.<sup>a</sup> If the plaintiff claim, not a sum expressly or implicitly agreed on, but damages for a tort or for a breach of contract, as for instance if he say that he has lost custom by being slandered in his trade, or that by reason of the non-delivery of goods he has had to buy others at a loss, he cannot specially indorse his writ. The advantage which gives importance to the power of specially indorsing the writ is that if the defendant do not enter an appearance within the time limited, the plaintiff may sign judgment for the sum indorsed without further proof of the claim,<sup>a</sup> and even if an appearance be entered, the plaintiff may apply for speedy judgment on affidavit without going to trial.<sup>b</sup> A special indorsement may also serve as a sufficient statement of claim in the action.<sup>c</sup> An example of a special indorsement is given in Form 13 of the Appendix, in the case of an action on a butcher's bill.

In an action for a liquidated demand the plaintiff, although permitted, is not bound to indorse his writ specially, but he must in all actions in which a claim of this class only is made supply for the defendant's benefit an indorsement of debt and costs; that is, he must amplify his general indorsement by claiming so much for debt and so much for costs. A form of indorsement must also be employed, stating that if the claim for debt and

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<sup>a</sup> Ord. iii. 6, p. 252.

<sup>b</sup> Ord. xiv. p. 269.

<sup>a</sup> Ord. xiii. 3, p. 267.

<sup>c</sup> Ord. xxi. 4, p. 286.

costs be paid to the plaintiff or his solicitor within four days, or, if the writ be for service abroad, within the time limited for appearance, all proceedings will be stayed. The defendant may pay the sum claimed, but if he think the amount due to costs too large he may have the costs taxed, and if one sixth be taxed off, the plaintiff's solicitor must pay the costs of taxation.<sup>d</sup>

In all cases where this remedy is appropriate the writ may be indorsed with a claim for an account,<sup>e</sup> which may then be obtained in default of appearance or immediately on appearance.<sup>f</sup>

The writ of summons, having been prepared by the plaintiff or his solicitor, is issued by sealing at the proper office, where a copy is left to be filed and an entry made in the cause book.<sup>g</sup> In Probate actions-an affidavit verifying the indorsements on the writ must be filed, in order to protect the representatives of a deceased person from vexatious proceedings.<sup>h</sup>

The next step is to serve the writ. In a great number of cases communications will already have taken place between the solicitors on both sides, and the defendant's solicitor will have undertaken to accept service and to enter an appearance. In such a case the writ is simply delivered at the office of the defendant's solicitor,<sup>i</sup> but in other cases the general rule is that the writ must be served personally.<sup>j</sup> To

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<sup>d</sup> Ord. iii. 7, p. 252.

<sup>e</sup> Ord. iii. 8, p. 253.

<sup>f</sup> Ord. xv. p. 271.

<sup>g</sup> Ord. v. 5-9, p. 255.

<sup>h</sup> Ord. v. 10, p. 256.

<sup>i</sup> Ord. ix. 1, p. 259.

<sup>j</sup> Ord. ix. 2, p. 260.

effect personal service duly a copy of the writ must be tendered to the defendant and the original shown to him if required, but there is full discretionary power to allow, by an order of the Court, a less formal mode of service, where the defendant is keeping out of the way, or where from any cause prompt personal service cannot be effected. There is also power to allow a "notice in lieu of service" by advertisement or otherwise to be given. The mode of proceeding against a defendant residing out of the jurisdiction, formerly a distinct branch of the law of actions, is now merely a question of service. Originally the only mode by which a plaintiff could obtain satisfaction of his demand out of the property which a defendant out of the jurisdiction might have within it, was by having him proclaimed an outlaw for contumacy in not appearing to the writ, and obtaining a share of the property forfeited by reason of the disabilities attached to that character. For this cumbersome and expensive proceeding the Common Law Procedure Act, 1852, substituted a process by which a plaintiff, where the cause of action arose within the jurisdiction, might issue a writ against a defendant out of the jurisdiction, and on proof of service, or of evasion of service by the defendant, might obtain leave to proceed in the action. The present practice<sup>k</sup> is for the plaintiff simply to obtain leave to issue and serve a writ on a defendant out of the juris-

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<sup>k</sup> Ord. ii. 4, p. 250; Ord. xi. p. 562.

diction, which he may do in all cases fairly within the cognisance of the English Supreme Court. These cases are where the subject of the action is real or personal property in England, or any instrument affecting it, a contract made or broken within the jurisdiction, or a tort done within it. An affidavit showing the place where the defendant is believed to be, and whether or not he is a British subject, must be made, and a special time for appearance depending on the distance will be inserted. Where a breach of contract is complained of the judge in exercising his discretion in granting leave to serve abroad is to consider the amount of the claim, and if the defendant reside in Scotland or Ireland what Court of limited jurisdiction might try the case in those countries.<sup>1</sup> A notice in lieu of writ to the effect that a writ has been issued may be substituted for the regular form of mandatory letter from the Queen, and is especially intended for the case of a defendant who is a foreigner. If some of the defendants be within and some without the jurisdiction "concurrent writs" can be issued, as also in any case where it is thought advisable to attempt service in more than one place at the same time.<sup>m</sup>

Particular directions are given for service on particular persons. Where husband and wife are defendants, service on the husband binds both, but it may be ordered that service on the wife alone shall be sufficient.<sup>n</sup> An infant may, in general, be served through the medium of his father or

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<sup>1</sup> Ord. xi. 1a, p. 263.    <sup>m</sup> Ord. vi. p. 257.    <sup>n</sup> Ord. ix. 3, p. 260.

guardian, or the person with whom he resides, but service on the infant himself may, by order, be made good service.<sup>o</sup> A lunatic is served through his committee, and a person of unsound mind not so found by inquisition is served through the person with whom he resides.<sup>p</sup> Partners sued in the name of their firm are served through one or more of their number, or through a manager at their place of business within the jurisdiction.<sup>q</sup> Corporations are generally served through some superior official, and there are many statutory provisions for service on public bodies. In actions for the recovery of land where no one is in possession, service may be effected by posting a copy of the writ on the door or other conspicuous place,<sup>r</sup> and in Admiralty actions in rem the writ is nailed to the mast, or in case of transhipped cargo is placed on the cargo, for a short time, and afterwards a copy left in its place.<sup>s</sup> Service may also be effected on the person in whose custody the cargo is, if he refuses access to it.<sup>t</sup> The person who effects the service must within three days indorse the date of service on the writ, as from this date the time allowed for the defendant to appear is counted.<sup>u</sup>

In Admiralty actions in rem in which, as we have seen, the proceeding is against the ship, cargo, or freight, a warrant for the arrest of the property is a necessary auxiliary to the writ.

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<sup>o</sup> Ord. ix 4, p. 260.

<sup>p</sup> Ord. ix. 5, p. 260.

<sup>q</sup> Ord. ix. 6, p. 260.

<sup>r</sup> Ord. ix. 8, p. 261.

<sup>s</sup> Ord. ix. 10, 11, p. 261.

<sup>t</sup> Ord. ix. 12, p. 261.

<sup>u</sup> Ord. ix. 13, p. 261.



The form of the warrant is given as Form 23 in the Appendix. The warrant of arrest is issued from the London office only, and an affidavit must be previously filed, showing the character of the claim and of the property to be arrested, and that the claim has not been satisfied. In particular varieties of this kind of action other details must be given in the affidavit. In a wages action, the nationality of the ship must be stated, and if foreign, it must be proved that notice has been given to the Consul; in a bottomry action the bond must be produced and a copy annexed; and in an action for the distribution of salvage the amount awarded or agreed on must be verified, and its holder designated.<sup>v</sup> The affidavit is required as a precaution against vessels being unnecessarily arrested. The warrant of arrest is served, not by the plaintiff, but the Admiralty marshal or his substitutes.<sup>x</sup>

Service having been effected the history of an action shifts from the plaintiff to the defendant. If he propose to defend the action, his first step is to enter an "appearance," a term derived from the ancient forms of legal procedure according to which the parties were bound to make a personal appearance in Court. The subject may be divided into the manner, place, and time of appearance, and the appearance by persons not named as defendants.

The manner in which an appearance is effected is by delivering a "memorandum of appearance"

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<sup>v</sup> Ord. v. 11, p. 256.

<sup>x</sup> Ord. ix. 9, p. 261.

to the proper officer.<sup>7</sup> The form of a memorandum of appearance is given as Form 2 in the Appendix, and the information given by the defendant in his first step is similar to that given by the plaintiff in the writ. Like the writ the memorandum of appearance is headed with the date of the year, and the letter, number, and title of the cause. The body of the memorandum consists simply of the words "Enter an appearance for X Y in this action." Then follow the date at which the memorandum was delivered, the name of the defendant's solicitor if he employ one, the solicitor's address, and if that address be outside the three-mile radius from Temple Bar, an address for service. If the defendant do not employ a solicitor, his own name appears as defending "in person," together with his address and an address for service if necessary. Partners sued in the name of the firm appear individually, but the action still continues as against the firm.<sup>8</sup> If several defendants appear by the same solicitor, as very commonly happens, one memorandum is sufficient. The memorandum concludes with an intimation whether the defendant does or does not dispense with a statement of claim, which has reference to the next step to be taken by the plaintiff. If the action be for the recovery of land, and the appearance be entered by a landlord who is in possession by his tenant, the memorandum of appearance must state that he

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<sup>7</sup> Ord. xii. 6, p. 264.

<sup>8</sup> Ord. xii. 12, p. 265.

appears as landlord.<sup>a</sup> It may also state in any such case that the person appearing limits his defence to certain land.<sup>b</sup>

The place of appearance is made important by the creation of District Registries. In the case of a London writ the place for appearance is the office of appearances for the Division to which the plaintiff has assigned his action. In a District Registry writ the place of appearance depends on the question whether the defendant reside or carry on business within the district. If he reside or carry on business within it, he must enter his appearance at the District Registry office.<sup>c</sup> If he neither reside nor carry on business within the district, he has the option of entering his appearance either in the District Registry or in London.<sup>d</sup> When an appearance is entered in a District Registry the action is said to proceed there, that is, all the steps down to final judgment are taken in the district. If there are several defendants, and some appear in London and others in a District Registry, the action proceeds in London.<sup>e</sup> When a defendant appears elsewhere than where the writ is issued, he must on the same day give notice by post or otherwise to the plaintiff or his solicitor at the address for service within the district;<sup>f</sup> and when a defendant has the option of appearing to a Registry writ in London, advantage cannot be

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<sup>a</sup> Ord. xii. 19, p. 266.

<sup>c</sup> Ord. xii. 2, p. 264.

<sup>e</sup> Ord. xii. 5, p. 264.

<sup>b</sup> Ord. xii. 21, p. 266.

<sup>d</sup> Ord. xii. 3, p. 264.

<sup>f</sup> Ord. xii. 6, p. 264.

taken of his non-appearance until a letter from London posted on the last evening might have been received by the plaintiff.<sup>s</sup>

The time for appearance limited by the writ is eight days from the service. At the expiration of that time the plaintiff may in general enter judgment by default, but if the plaintiff do not take this advantage at the earliest moment, the defendant may enter an appearance at any time before judgment. In this case, however, so far as the taking of any further step by him is concerned, his appearance is considered as entered at the expiration of the eight days.<sup>b</sup>

An appearance by a person not named as a defendant may be entered in certain exceptional cases. In Probate actions any person interested in the estate of the deceased may enter an appearance on filing an affidavit to that effect.<sup>1</sup> So, in an Admiralty action any person interested in the ship, cargo, or freight involved may appear on filing an affidavit.<sup>k</sup> These proceedings are called "interventions." Similarly, in an action for the recovery of land, any person in possession either by himself or his tenant may by leave enter an appearance on filing an affidavit of his possession.<sup>1</sup> He must also give notice of his appearance to the plaintiff's solicitor, or the plaintiff suing in person.<sup>m</sup>

<sup>s</sup> Ord. xiii. 5a, p. 268.

<sup>1</sup> Ord. xii. 16, p. 266.

<sup>1</sup> Ord. xii. 18, p. 266.

<sup>b</sup> Ord. xii. 15, p. 266.

<sup>k</sup> Ord. xii. 17, p. 266.

<sup>m</sup> Ord. xii. 20, p. 266.

## CHAPTER IV.

## THE PLEADINGS.

THE defendant having appeared and both parties being before the Court, the pleadings commence. Pleadings may be defined as statements in writing made before the trial by the plaintiff and the defendant alternately, for the purpose of exhibiting their respective cases and answering the case of their opponent. By showing what facts are alleged by both parties, what are admitted and what are denied, the pleadings suggest to the parties to what point to direct their proof at the trial, and assist the judge in determining what is the real matter in dispute. As each fact stated either by way of claim or defence is brought forward for the sake of its significance in point of law, the pleadings also serve to show each party what his opponent assumes to be the law, and give him the opportunity of raising legal questions.

In the early ages of the common law, the pleadings were "altercations" delivered *vivâ voce* by the counsel. The writ by which the action was commenced used to be brought into the Court with the sheriff's return upon it, and the plaintiff's counsel, after it had been read, proceeded to expand the charge contained in it into a connected

story, by adding time, place and other circumstances. Thus, if the writ mentioned the cause of action to be trespass, the plaintiff's counsel stated where, when and how the trespass was committed, and what special damage had resulted from it. This statement was called the "count," from the French *conte*, a tale or story. The defendant's counsel, on his part, stated the defence with similar precision, and this was called the "plea." The plaintiff's counsel "replied;" the defendant's, if necessary, "rejoined;" and so on, until they had come to a contradiction either in law or fact. If either conceived that the last pleading on the opposite side was untrue in fact, he positively denied it, and was then said "to take issue upon it." If he conceived it to be bad in law, he "demurred," so called from the French *demurrer*, to abide, because he abided by the determination of the point of law, conceiving that the insufficiency of his opponent's pleading furnished him with a sufficient answer to his case. Thus was an "issue" produced either of fact or of law. If of law, it was decided by the Court; if of fact, it was tried, in most cases, by a jury.

While the proceedings were going on, the officer of the Court sat at the feet of the judges, entering them on a parchment roll or record. This record bore different names at different times. When the pleadings only were in process of being entered, it was called "the plea roll;" when the issue had been joined and entered on it, it was called "the issue roll;" and when the judgment had been re-

corded on it, it was called "the judgment roll;" being all along the same piece of parchment, but bearing different names at different periods of the suit.

When business increased and causes became complicated, the system of *vivâ voce* pleading was found inconvenient, and, instead of pronouncing the pleadings aloud, they were drawn on paper, and filed in the office of the Court, or delivered between the parties. The judges heard nothing about them until issue or demurrer, and thus considerable time was saved. As to the roll, it was, at first, transcribed from the written pleadings by the officers, as anciently from the *vivâ voce* pleadings. Afterwards, the officers, finding themselves pressed for time, requested the attorneys to transcribe it themselves, and bring it to the office: and the attorneys, finding this irksome, began to omit carrying it in at all, except in cases where it was wanted for some particular purpose; so that, in most cases, the roll existed only in contemplation of law. The roll now no longer exists, and the only record corresponding to it are the entries in the cause book and judgment book. The cause book contains an entry of the writ<sup>a</sup> and appearance,<sup>b</sup> and the judgment book<sup>c</sup> of the judgment given in the action. The pleadings do not appear on any record of the Court, but copies of them have to be delivered on entering the action for trial<sup>d</sup> and on entering judgment.<sup>e</sup>

<sup>a</sup> Ord. v. 8, p. 256.

<sup>b</sup> Ord. xii. 11, p. 265.

<sup>c</sup> Ord. xli. 1, p. 318. <sup>d</sup> Ord. xxxvi. 17, p. 309. <sup>e</sup> Ord. xli. 1, p. 318

For some time after the pleadings thus came to be transcribed on paper they were governed by the same natural rules which regulated them when pronounced *vivâ voce*. In process of time, however, an artificial system was created with many useless allegations, fictions, subtleties and forms by which substantial justice was often defeated, and the result of an action made to turn rather on the skill of the pleaders than the merits of the case. This technical system has been in recent years much modified, especially by the Common Law Procedure Acts, but in the meantime arose the system of pleading used in the Court of Chancery, which as one of the sources of the procedure of the Supreme Court demands attention.

The Court of Chancery did not recognise the rule which lay at the bottom of the common law system, and which assumed that every dispute could be reduced to a single issue or controverted point either of law or fact. It allowed the parties to plead at large and to raise any points which they thought maintainable, and as the jurisdiction of the Court was independent of fictions, the pleadings were intelligible to the ordinary reader. On the other hand a confusion was made between the true functions of pleading and evidence, the defendant in his answer being allowed to mix up proof on oath with mere allegations. Moreover the pleadings in the Court of Chancery degenerated into great verbosity, especially in unnecessarily setting out lengthy documents. The pleadings in the Court of Probate



were after the type of the Common Law Courts, but the Court of Admiralty brought to the service of the new Supreme Court a system of pleading which was much more simple and intelligible than the common law system, and perhaps of the systems in use in the consolidated Courts the nearest approach to that adopted in the Supreme Court.

It is interesting to remark that the effect of the rules of pleading introduced of late years has been to bring the common law practice back to its old bounds, and destroy innovations which had crept in on the ancient system. Although, therefore, the modes of pleading used in the old Courts now give place to an entirely new mode of pleading, it is necessary before entering upon a detailed examination of the new system to refer briefly to the method of pleading formerly used in the Common Law Courts as the source of all the other old systems and of much in the new.

The first step in the pleadings was the "declaration," in which the plaintiff stated his cause of action in one or more counts. Prior to the Common Law Procedure Act, 1852, all the counts must have belonged to the same form of action, and before the year 1834 it was the common practice to insert in the declaration a great number of counts, not stating different causes of action against the same person, but stating the same cause of action in different ways. Thus, in an action for breach of promise of marriage, the plaintiff would say, in her first count, "that the defendant pro-

mised to marry her upon request," and in the second, "that he promised to marry her within a reasonable time for that purpose." And so, in almost every case, several counts were inserted in each declaration, stating the same case in different ways. This practice was due to the strictness of the legal rules in respect of "variance." A variance or divergence between a material part of the statement of the cause of action in the declaration and the evidence adduced at the trial in support of it was fatal, and a ground of nonsuit. Plaintiffs were consequently often nonsuited in the most vexatious manner on account of slight variances between the declaration and the evidence. To such an extreme was this carried, that there is a reported case<sup>f</sup> in which the plaintiff was nonsuited because, in copying Lord Waterpark's title in the declaration, the clerk, instead of writing Baron Waterpark, of Waterpark, had written Baron Waterpark of Waterfork. It was in order to prevent the fatal mischief often occasioned by these trifling variances, that pleaders inserted a great number of counts in the declaration, stating the cause of action in different ways, in the hope that, if the evidence varied from some, it might not from others; and that one count, at least, might be found free from objection on this score. The consequence of inserting all these counts was to increase the size, and of course the expense, of the declaration; and at last, on the

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<sup>f</sup> *Walter v. Mace*, 2 B. & A. 756.

recommendation of the Law Commissioners of 1832, it was determined to put an end to the abuse by getting rid of the reason which occasioned it. Accordingly, power was given to the judges to amend variances between the statements in the pleadings and the evidence:<sup>s</sup> and as this power, thus vested in the judges, rendered the multitude of counts unnecessary, by creating another mode of obviating the danger of variances, it was directed that several counts should not be allowed, unless a distinct subject-matter of complaint was intended to be established in respect of each.<sup>h</sup>

Under the present system of pleading counts and pleas, which might be defined as bundles of facts carefully tied together so as to contain all the elements of a legal claim, or of a legal defence, are no longer used. Pleadings are no longer to be divided into parts, each constituting a legal result, but are to be chronological narratives of facts given in paragraphs, from which any legal result raised by the facts may be gathered. The power of amendment is therefore the less necessary, but is still retained in case a party should by inadvertence, or through want of knowledge subsequently obtained, omit or mis-state a material fact, which mistake it is no injustice to his opponent to allow him to correct.

A very important part of every declaration was the "venue," which was inserted in the margin

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<sup>s</sup> 3 & 4 Wm. IV. c. 42.

<sup>h</sup> Pleading Rules, H. T. 1834.

thus:—"Middlesex, to wit"—"London, to wit:" and in the county named in the venue the action was ultimately tried. Venue was of two kinds, transitory or local. It was transitory when the cause of action was of a sort which might have happened anywhere, in which case the plaintiff might adopt any county he pleased as a venue. It was local when the cause of action could have happened in one county only, and then the venue must have been laid in that county. Thus, if the action were trespass for breaking the plaintiff's close, the venue must have been laid in the county where the close was situated; for such a trespass could have happened nowhere else. If it were trespass for assaulting the plaintiff, the venue was transitory, for such a cause of action might happen anywhere, and so in general in all cases of contract. Under the new rules of pleading venue is expressly abolished,<sup>1</sup> but the plaintiff, if he wish to have the action tried elsewhere than in Middlesex, must name a place for its trial, subject to the place being altered by an order. In making the order, considerations of convenience now alone apply.

The plea was the defendant's answer to the declaration, and was either a plea in abatement or a plea in bar. A plea in abatement did not contain an answer to the cause of action, but showed that the plaintiff had committed some informality, and pointed out how he ought to have proceeded. For instance, there might be a plea in abatement for

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<sup>1</sup> Ord. xxxvi. 1, p. 306.

nonjoinder of a co-contractor as a defendant, stating also that all the co-contractors not joined were resident within the jurisdiction. A plea in bar was a peremptory and substantial answer to the action. Such a plea was either a "traverse" or a plea "in confession and avoidance;" to pass over the "plea in estoppel," which alleged that the plaintiff, either by a deed, judgment, or other matter, was prevented from setting up the fact relied on, but which was of rare practical occurrence.

A plea was said to be a traverse when it denied some essential part of the declaration. It was in confession and avoidance, when it admitted the averments of fact in the declaration to be true, but showed some new matter not mentioned in the declaration which destroyed the plaintiff's right of action. Thus, in an action against the maker of a note, if the defendant pleaded "he did not make the note," that was a traverse. But if he pleaded "that he did make it, but for an illegal consideration, of which the plaintiff was aware," that was a plea in confession and avoidance.

Pleas in confession and avoidance were distinguished as pleas in justification or excuse and pleas in discharge. The former class showed some justification or excuse of the matter charged in the declaration; those of the latter, some discharge or release of that matter. The effect of the former, therefore, was to show that the plaintiff never had any right of action, because the act charged was lawful; the effect of the latter, to

show that, though he had once a right of action, it was discharged or released by some matter subsequent. Of those in justification or excuse, the plea of "son assault demesne," or assault in self-defence, was an example; of those in discharge, a release.

In strict theory, the defendant was allowed but one plea to each count of the declaration; and for this restriction a very unsatisfactory reason was assigned, namely, that as one defence was sufficient to rebut the action, the defendant could have no occasion to set up more. But it is obvious that a defendant may have several good defences to the same action, and yet may reasonably wish to plead them all, in order that, if by some accident his evidence of one of them should fail, he may rely upon another. The strictness with which the defendant was bound down to one plea, gave rise to the vicious practice of comprehending in one plea what were really several distinct answers to the declaration.

These comprehensive pleas were called the general issue, and were specially applicable to the actions of assumpsit, debt upon simple contract, and case, which are the most ordinary forms of action. They were called respectively "non assumpsit," "nil debet," and "not guilty;" and under these general issues almost every conceivable defence was allowed to be given in evidence, so that the defendant obtained the advantage of being allowed to set up any defence his evidence would warrant; while the plaintiff was, on his side, not

unfrequently surprised by a defence of which the pleadings gave him no notice whatever.

Later on in the history of pleading, when permission was constantly given either by a rule or order under various statutes to plead "several matters," another abuse crept in similar to that occasioned by the right to multiply counts in a declaration. The defendant's pleader was in as much danger of failing through a variance between the evidence and his plea as the plaintiff was by a variance between the evidence and the declaration. The defendant's pleader guarded against variances by pleading a number of pleas stating the same defence in different ways, in the hope that some one of them would hit the evidence; thus, in an action of trespass "*quare clausum fregit*," he would plead, in a variety of different pleas, that he had a footway, that he had a cartway, that he had a bridle path, and allege the same way to have accrued by grant, prescription and necessity. The consequence of this of course was that a great deal of expense and prolixity was occasioned. These evils were mitigated from time to time by the multiplication of counts and pleas being forbidden, and suitors made to rely on the power of amendment at the trial, and by the effect of the general issue being cut down within more reasonable limits. Under the present practice the framing of each defence as a distinct plea is abandoned in like manner as the practice of distinct counts; pleas in abatement have been abolished,<sup>\*</sup> and the general

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<sup>\*</sup> Ord. xix. 13, p. 280.

issue has now no further effect than the words used would have in their ordinary sense, except in the case of "not guilty by Statute," a privilege belonging to persons sued for any act done under certain Acts of Parliament, which is still retained.<sup>1</sup>

The vagueness of the old system of pleading was not confined to pleas of the general issue, but extended also to the counts in the declaration by reason of their being framed very much in the abstract, and without mention of time, place, and other identifying circumstances. Accordingly, it sometimes happened that the defendant in his plea mistook or appeared to mistake the cause of action set up by the plaintiff. In such case the plaintiff with his reply delivered a "new assignment," stating that he sued for other causes of action than that pleaded to. Out of great caution the plaintiff sometimes new assigned in this way several times over, but the Common Law Procedure Act, 1852, restricted him to one. New assignments are now abolished, and the plaintiff, if necessary, must make his claim more definite by amendment.<sup>m</sup>

The subsequent steps in pleading were the "replication," containing the plaintiff's answer to the plea; the "rejoinder," the defendant's answer to the replication; the "sur-rejoinder," the "rebutter," the "sur-rebutter," and so on. The pleadings seldom reached to sur-rebutter, but they sometimes did, and there was nothing to prevent their going

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<sup>1</sup> Ord. xix. 16, p. 281.

<sup>m</sup> Ord. xix. 14, p. 281.



beyond it. But the steps after sur-rebutter had no distinctive names. At each of these steps the party replying, rejoinding, or framing any other pleading, was required either to traverse, or confess and avoid, that is, either to deny some material part of the adversary's last pleading, or to admit such last pleading to be true, but allege some new matter, altering the legal effect of it, and showing that he himself was nevertheless entitled to judgment. Thus the pleadings went on step by step till at last the parties came, as they necessarily did, to a direct contradiction; and when the pleadings were complete, the issue was said to be joined.

The system of pleading introduced by the Judicature Acts very much shortens the number of the alternate statements made by the parties. Unless an order be obtained allowing further steps in pleading,<sup>n</sup> the pleadings consist of the "Statement of Claim," the "Statement of Defence," and the "Reply," which, if necessary, may be followed by a joinder of issue, the old names being changed in favour of names which serve better to explain the nature of the document. A very convenient practice is borrowed by the Supreme Court from the Court of Chancery by which every pleading must be printed unless it contain less than 3 folios of 72 words, when it may be written or partly printed,<sup>o</sup> but the signature of counsel required in that Court has been abandoned as an unnecessary tax on the suitor.<sup>p</sup>

<sup>n</sup> Ord. xxiv. 2, p. 289. <sup>o</sup> Ord. xix. 5, p. 279. <sup>p</sup> Ord. xix. 4, p. 279.

The statement of claim, which stands in the place of the declaration at law and the bill in equity, must be delivered by the plaintiff within six weeks from the defendant's appearance,<sup>1</sup> except in Admiralty actions in rem, in which it must be delivered within twelve days from the appearance.<sup>2</sup> The defendant, except in Probate actions and Admiralty actions in rem, may, if he think that he is sufficiently informed of the nature of the plaintiff's claim by the writ, or that the question in the action is of so simple a kind as not to require pleadings, state in his appearance that he does not require a statement of claim. In that case the plaintiff can only deliver a voluntary statement, of which he will have to bear the costs if it be unnecessary.<sup>3</sup> On the other hand, a plaintiff who has specially indorsed his writ, may, instead of a statement of claim, deliver a notice referring his opponent to the indorsement if he has nothing to add to it.<sup>4</sup> Ordinarily a statement of claim consists of a narrative of the facts relied upon by the plaintiff in support of his case. It begins like the writ with the title of the action, and ends with a definite claim for damages or other relief, either alone or in the alternative, and with a general claim for such relief as the Court may think the plaintiff entitled to have.<sup>5</sup> Distinct claims based on distinct facts should be separated.<sup>6</sup> Examples of statements of claim are given as Forms, 3, 4, 20, and 24 in the Appendix.

<sup>1</sup> Ord. xxi. 1 (a), p. 285.

<sup>2</sup> Ord. xxi. 1 (b), (c), p. 285.

<sup>3</sup> Ord. xix. 8, p. 280.

<sup>4</sup> Ord. xxi. 3 p. 286.

<sup>5</sup> Ord. xxi. 4, p. 286.

<sup>6</sup> Ord. xix. 9, p. 280.

The statement of defence is the answer of the defendant to the facts relied on by the plaintiff in the statement of claim. It may admit certain facts, deny others, and adduce further facts, for the purpose of destroying the legal effect of facts admitted or unadmitted. A duty is imposed on the defendant by the rules of pleading to admit facts which cannot fairly be denied, otherwise the cost occasioned by denying them will be imposed on him.<sup>7</sup> The defendant's admission of a part of the plaintiff's claim may take the form of payment into Court. Before or at the time of delivering his defence he may pay into Court in any form of action a sum of money in satisfaction of the demand of debt or damages, and afterwards plead such payment in his statement of defence.<sup>8</sup> He may combine this plea with a denial of the plaintiff's cause of action, as inconsistent defences are not inadmissible, unless embarrassing.<sup>9</sup> The money is paid to an officer of the Court who gives a receipt for it, and is paid out to the plaintiff's solicitor on production of a written authority from his client.<sup>b</sup> If the plaintiff accept the sum paid in satisfaction, he gives notice to his opponent to that effect, and is then entitled to his costs. If he do not accept it as sufficient, he so states on the pleadings, and the sufficiency of the amount becomes an issue between the parties.<sup>c</sup>

Besides answering the claim of the plaintiff,

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<sup>7</sup> Ord. xxii. 4, p. 287.

<sup>8</sup> Ord. xxx. 1, p. 296.

<sup>a</sup> *Berdun v. Greenwood*, 47 L. J. Ex. 628; L. R. 3 Ex. D. 251.

<sup>b</sup> Ord. xxx. 3, p. 296.

<sup>c</sup> Ord. xxx. 4, p. 296.

the statement of defence may also contain a counter-claim, that is, a claim for redress on the part of the defendant from the plaintiff, either alone or in conjunction with others. The area of counter-claims is much less limited than that of set off under the previous law. A set off was only allowed in cases where there might be an ordinary debtor and creditor account between the parties. It could only be pleaded in an action for a liquidated sum, and must itself have consisted of a claim for a liquidated sum. An action may now be employed to clear up all the disputes existing between the parties, and a counter-claim may be pleaded in any kind of action and may itself consist of any kind of claim, legal or equitable.<sup>c</sup> Formerly a defendant could only rely on a set off as a defence to the plaintiff's claim, but now a balance of money may be adjudged to a defendant, or an injunction or other relief may be decreed in his favour.<sup>d</sup> If the counter-claim involve other persons than the plaintiff, the defendant must add to the title of his statement of defence a fresh title composed of the parties to the counter-claim.<sup>e</sup> If these persons are defendants in the action, he must deliver his statement of defence to them as well as the plaintiff, but if they are not parties he must serve them with a copy of the statement of defence indorsed in such a form as to make it analogous to a writ.<sup>f</sup> A person so served may appear<sup>g</sup> and join

<sup>c</sup> Jud. Act, 1873, s. 24(3); Ord. xix. 3, p. 279. <sup>d</sup> Ord. xxii. 10, p. 287.

<sup>e</sup> Ord. xxii. 5, p. 287. <sup>f</sup> Ord. xxii. 6, p. 287. <sup>g</sup> Ord. xxii. 7, p. 287.

the pleadings at the reply, which in his case will be in the nature of a statement of defence, and must be delivered within the time allowed for that pleading.<sup>h</sup> A counter-claim, however, is always subject to be excluded from the action if thought proper by an order.<sup>i</sup>

The statement of defence must be delivered within eight days from the delivery of the statement of claim, unless further time be given.<sup>k</sup> Although the defendant has dispensed with a statement of claim in his memorandum of appearance he may still deliver a statement of defence.<sup>l</sup> In a Probate action, a defendant may, with his defence, give notice that he merely insists on the will being formally proved, and intends to cross-examine the plaintiff's witnesses only.<sup>m</sup> Examples of statements of defence are given as Forms 4, 16, 21 and 25 in the Appendix.

The reply must be delivered within three weeks after the statement of defence,<sup>n</sup> and contains a denial or admission of the facts in the defence, or an allegation of fresh facts made for the purpose of destroying the legal effect of the facts alleged in the statement of defence. A joinder of issue is a common form of reply. It cannot be used in answer to a counter-claim, and its effect is to deny all the material allegations of the defence.<sup>o</sup> If a counter-claim be set up, the reply must deal with

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<sup>h</sup> Ord. xxii. 8, p. 287.

<sup>i</sup> Ord. xxii. 9, p. 287.

<sup>k</sup> Ord. xxii. 1, p. 286.

<sup>l</sup> Ord. xxii. 2, p. 286.

<sup>m</sup> Ord. xxii. 11, p. 288.

<sup>n</sup> Ord. xxiv. 1, p. 289.

<sup>o</sup> Ord. xix. 21, p. 282.

it specifically.<sup>p</sup> Even if the reply contain more specific allegations than a joinder of issue, it is generally enough for the defendant to plead a joinder of issue to the reply. A simple joinder of issue constitutes the close of the pleadings,<sup>q</sup> and if the defendant wish to plead any other pleading after reply he must obtain an order for that purpose.<sup>r</sup> If, after all, the pleadings do not succeed in sufficiently defining the issues of fact in dispute between the parties, an order may be obtained for the preparation of issues, or they may be settled by a judge.<sup>s</sup>

The statements of claim and of defence, and the reply, are always liable to be interrupted by a demurrer, which has been retained almost without alteration from the systems of pleading used both at common law and in Chancery. A demurrer is a pleading delivered within the same time as the corresponding pleading in fact, and alleging that the previous pleading of the opponent, or part of his pleading, is insufficient in law.<sup>t</sup> Thus a demurrer to a statement of claim alleges that the facts stated do not in law give the plaintiff the right of action which he claims. A demurrer to a statement of defence alleges that the facts stated do not in law constitute an answer to the statement of claim. If part of a pleading be demurred to, it must be a distinct and substantive part intended to stand by itself. For the purposes of argument the demurrer admits the facts demurred

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<sup>p</sup> Ord. xix. 20, p. 281.

<sup>q</sup> Ord. xxv. p. 289.

<sup>r</sup> Ord. xxiv. 2, p. 289.

<sup>s</sup> Ord. xxvi. p. 289.

<sup>t</sup> Ord. xxviii. 1-3, p. 291.

to in point of fact, but an order may be obtained for leave to plead and demur to the same facts, in which case the demurrer and the pleading in fact are combined in the same pleading.<sup>u</sup> An example of a demurrer is given as Form 17 in the Appendix, and a ground for demurring in law must always be assigned on the face of it.<sup>x</sup> When a demurrer is delivered, the party whose pleading is demurred to must either amend his pleading or set down the demurrer for argument.<sup>y</sup> If he think the matter demurred to can be made good in law by adding further facts, he may apply for an order to amend. This order will not be made except on payment of the costs of the demurrer.<sup>z</sup> If he neither set down the demurrer nor obtain an order to amend within ten days, the demurrer is held to be sufficient both as to costs and otherwise.<sup>a</sup> If the demurrer be set down, it is argued on the footing that the facts stated in the pleadings are true. The argument formerly took place in the Common Law Courts before the Court in banc, but in the High Court it takes place before a single judge, as formerly in the Court of Chancery. If the demurrer be allowed, the matter demurred to is deemed to be struck out of the pleading.<sup>b</sup> If it be disallowed, the Court may give leave to the demurring party to plead to the matter demurred to in point of fact.<sup>c</sup> If a demurrer to the whole

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<sup>u</sup> Ord. xxviii. 4-5, p. 292.

<sup>x</sup> Ord. xxviii. 2, p. 292.

<sup>y</sup> Ord. xxviii. 6, p. 292.

<sup>z</sup> Ord. xxviii. 7, p. 292.

<sup>a</sup> Ord. xxviii. 6, p. 292.

<sup>b</sup> Ord. xxviii. 10, p. 293.

<sup>c</sup> Ord. xxviii. 12, p. 293.

or a part of a pleading is allowed upon argument, the unsuccessful party in general pays the costs of the demurrer.<sup>d</sup> If a demurrer to a whole statement of claim be allowed, the defendant has all the costs of the action, unless the amendment of the statement of claim be allowed.<sup>e</sup>

The result of a demurrer may show either party the necessity for altering his statement of facts or adding fresh facts, or for some other reason it may be expedient during the course of the pleadings to make such an alteration or addition. This is done by amendment, which may be under an order giving leave or without leave. The terms on which an amendment is allowed when a demurrer is pending have already been stated. In ordinary cases the plaintiff may amend his statement of claim without leave once before delivering his reply;<sup>f</sup> and the defendant setting up a counter-claim may amend it without leave once before pleading to the reply.<sup>g</sup> If there be no defence delivered, the plaintiff has four weeks from the appearance within which to exercise his right of amending, and if there be no reply to a counter-claim the defendant has the same time from the defence. The right is subject in both cases to an application by the opponent within eight days from the delivery of the amended pleading for an order disallowing the amendment, or to amend his own pleading.<sup>h</sup> Besides this amendment as of course,

<sup>d</sup> Ord. xxviii. 8, p. 293.

<sup>e</sup> Ord. xxviii. 9, p. 293.

<sup>f</sup> Ord. xxvii. 2, p. 290.

<sup>g</sup> Ord. xxvii. 3, p. 290.

<sup>h</sup> Ord. xxvii. 4-5, p. 290.



an order to amend may be applied for at any time either during the pleadings or at the trial.<sup>1</sup> The amendment may be made with pen and ink on the pleading as unamended, but if 144 words have to be added in any one place, the pleading must be reprinted.<sup>2</sup> The amended pleading must be marked with the date of the amendment,<sup>1</sup> and delivered to the opposite party within the time allowed for amending.<sup>3</sup>

Sometimes the plaintiff finds that he has misconceived his claim beyond the power of amendment, or for some other cause he may wish to abandon his action. This may be done by discontinuance; and a plaintiff may discontinue his action by giving notice before taking the next step after statement of defence, without leave, on payment of the defendant's costs.<sup>4</sup> In other cases an order to discontinue is required.

A subject akin to amending is that of pleading matters arising during the pendency of the pleadings. If fresh facts constituting a defence arise after the statement of defence, or after the reply to a counter-claim has been delivered, the defendant or plaintiff may within eight days obtain an order for leave to deliver a further defence or reply, in the nature of what was called under the former system, a pleading "*puis darrein continuance*."<sup>5</sup> Where facts amounting to a defence, which arose since the action was brought, are pleaded, the

<sup>1</sup> Ord. xxvii, 6, p. 290.

<sup>1</sup> Ord. xxvii, 9, p. 291.

<sup>2</sup> Ord. xxiii, 1, p. 288.

<sup>2</sup> Ord. xxvii, 8, p. 291.

<sup>3</sup> Ord. xxvii, 10 p. 291.

<sup>5</sup> Ord. xx, 2, p. 284.

plaintiff may deliver a confession of the defence, and may generally sign judgment for his costs up to the pleading of such defence.<sup>p</sup> When facts arise amounting to a discharge of the claim, even after judgment, the party in danger of execution, or actually in execution, may apply for an order for a stay or other relief. This proceeding was formerly called "*auditâ querelâ*," which was a writ analogous to a writ of error, but which has now been abolished.<sup>q</sup>

In actions for damage by collision at sea, a document analogous to a pleading, called a "preliminary act," must be filed before the pleading by each party. This document contains a statement of those particulars which are always material in these cases, such as the state of the weather, the direction of the wind, the course of the vessel, what lights the ship carried, and soon.<sup>r</sup> The "Preliminary Act" is not delivered between the parties, but is sealed up, and only opened by order of the judge. Its object is to obtain independent statements from both sides of these necessarily material facts, so that the admitted facts in the case may be made clear and the parties prevented from shaping their version of the facts to meet their opponent's.

Such being a description of the successive stages of pleading, there are certain principles laid down generally for the guidance of the pleader. Some of these which abrogate specifically certain of the former rules of pleading have already been ad-

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<sup>p</sup> Ord. xx. 3, p. 284.

<sup>q</sup> Ord. xlii. 22, p. 323.

<sup>r</sup> Ord. xix. 30, p. 283.

verted to. The rest may be naturally deduced from the theory of pleading as already explained, and from the assumption that each side is fairly to present his case to his opponent. Thus allegations not denied are taken as admitted.<sup>a</sup> Such defences as fraud, or the Statute of Limitation, or any other defence which may be set up by way of confession and avoidance, must be specially pleaded;<sup>t</sup> but a party need not allege a fact which the law presumes in his favour, or the burden of proving which lies on the other side.<sup>u</sup> The pleadings on each side are to be consistent with the previous pleading of the same party.<sup>x</sup> A claim or counter-claim must not merely be denied in general terms, but each allegation of fact must be dealt with. Documents must be abstracted and not set out at length, unless the precise words are material.<sup>y</sup> Allegations of complex facts like malice or fraudulent intention may be made without setting out the circumstances from which they are inferred,<sup>z</sup> and generally evidence is not to be pleaded.<sup>a</sup> The new rules require pleadings in an action for the recovery of land, but it is in general enough for a defendant to plead that he is in possession, unless he rely on an equitable defence.<sup>b</sup> All forms of unfair denial are forbidden, such as denying a fact alleged with circumstances and not also denying it without the circumstances,<sup>c</sup> and it

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<sup>a</sup> Ord. xix. 17, p. 281.

<sup>u</sup> Ord. xix. 28, p. 283.

<sup>y</sup> Ord. xix. 24, p. 282.

<sup>a</sup> Ord. xix. 4, p. 279.

<sup>t</sup> Ord. xix. 18, p. 281.

<sup>x</sup> Ord. xix. 19, p. 281.

<sup>z</sup> Ord. xix. 25, p. 282.

<sup>b</sup> Ord. xix. 15, p. 281.

<sup>c</sup> Ord. xix. 22, p. 282.

may be said generally that the pleadings now in use are intended to be a fair statement in popular language of the facts upon which each party relies for the maintenance of his case.

## CHAPTER V.

## EVIDENCE BY AFFIDAVIT.

THE general practice of the High Court is to take the evidence in the action, that is, the evidence directed to the disputed facts raised on the pleadings, by the oral examination of witnesses at the trial after the system in use in the former Courts of Common Law.<sup>a</sup> But the ordinary practice of the Court of Chancery was to take the evidence by affidavits, which were filed as soon as the pleadings were sufficiently advanced, and this practice is adopted in the High Court whenever the parties think fit to consent to that course. As there are many forms of action in which the question is rather of law or judicial discretion than of fact, and in which consent to the use of affidavits is encouraged,<sup>b</sup> the process of taking evidence by affidavits is an important step in an action; following in natural order the close of the pleadings.<sup>c</sup> The cases in which evidence may conveniently be taken by affidavit are of course cases

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<sup>a</sup> Ord. xxxvii. 1, p. 313.      <sup>b</sup> Ord. xxxviii. 1, p. 314.

<sup>c</sup> *Patterson v. Wooler*, 45 L. J. Ch. 274; L. R. 2 Ch. D. 586.

tried before a judge and not before a jury, and leave to try with a jury a case in which the evidence has been taken on paper will generally be refused.<sup>c</sup>

An affidavit is a written statement sworn to or affirmed before a person having authority to administer oaths. It may be divided into four parts, the title, the description of the deponent, the body or contents, and the "jurat."

The title of an affidavit is the same as the title of the writ of summons in the action.

The description of the deponent includes his true place of residence and addition, but these particulars need not be given in the case of a party to the action.<sup>d</sup>

Thirdly, with respect to the contents of the affidavit, the main rule is, that they should be explicit and positive, so that if false, perjury may be assigned upon them. The Judicature Act<sup>e</sup> is very strict upon this point, and requires affidavits when used as evidence in the action to be confined to facts within the witness's own knowledge. Upon "interlocutory" or incidental applications the deponent is allowed to speak as to his belief, in which case the common form employed is "that he is informed and verily believes." He ought, however, to give the grounds of his belief. Argumentative matter ought not to be inserted, and copies of, or extracts from, documents very sparingly used, but documents may be referred to as "produced and shown" to the deponent.

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<sup>c</sup> *Brooke v. Wigg*, 47 L. J. Ch. 749; L. R. 8 Ch. D. 510.

<sup>d</sup> R. 138, H. T., 1853.

<sup>e</sup> Ord. xxxvii. 3, p. 313.

The party who files an affidavit which offends in either of these particulars or in unnecessarily introducing hearsay evidence is liable to bear the costs. Affidavits must be drawn up in the first person and divided into paragraphs, which must be numbered consecutively, and, as nearly as may be, confined to a distinct portion of the subject.<sup>f</sup>

Fourthly, the jurat consists of a short statement at the foot of the affidavit of the time when, the place where, and the person before whom it was sworn. It may be sworn in Court or before any one of the judges, or before a commissioner appointed to take affidavits in the Supreme Court. Affidavits cannot be sworn before a party's own solicitor or his clerk. In Scotland and Ireland,<sup>g</sup> in the Isle of Man and the Channel Islands,<sup>h</sup> affidavits are sworn before commissioners appointed for that purpose. In a foreign country affidavits may be sworn before a mayor, magistrate, or other officer authorized by the law of such country to administer an oath, or before a British consul<sup>i</sup> or British ambassador, vice-consul, and others.<sup>k</sup> When there are several deponents, their names must appear severally in the jurat in this way: "The above-named deponents, A., B., and C., were severally sworn."<sup>1</sup> The deponent signs his name at the side of the jurat, and the person administering the oath at the foot of it. Persons declining from con-

<sup>f</sup> 15 & 16 Vict. c. 86, s. 37; R. 2 M. V., 1854.

<sup>g</sup> 3 & 4 Will. IV., c. 42, s. 42.

<sup>h</sup> 22 Vict. c. 16, s. 3.

<sup>k</sup> 18 & 19 Vict. c. 42.

<sup>i</sup> 6 Geo. IV., c. 87, s. 20.

<sup>1</sup> R. 139, H. T., 1853.

scientious scruples to be sworn may affirm.<sup>m</sup> Persons who object to take an oath, and on whose conscience an oath has no binding effect, may depose under a "solemn promise and declaration" that they will speak the truth.<sup>n</sup> Affidavits must have a stamp affixed to them.

Whenever an agreement to take the evidence by affidavit is concluded, the plaintiff must within fourteen days, or the time specified in the agreement or allowed by order, file his affidavits and deliver a list of them to the defendant or his solicitor.<sup>o</sup> Similarly the defendant within the same period must file his affidavits and deliver his list.<sup>p</sup> Seven days after the expiration of the time given to the defendant to file his evidence are allowed to the plaintiff to file and deliver a list of affidavits in reply, which must be strictly confined to this purpose.<sup>q</sup> Either party wishing to cross-examine any of his opponent's witnesses may require the production of the witness by his opponent at the trial. If the witness is not produced accordingly, his evidence cannot be read. The notice must be given within fourteen days after the expiration of the time for filing affidavits in reply.<sup>r</sup> The witness may be subpoenaed by the party to whom the notice is given in order to enforce his attendance.<sup>s</sup> Evidence given in accordance with

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<sup>m</sup> C. L. P. Act, 1854, s. 20.

<sup>n</sup> 32 & 33 Vict. c. 68; 33 & 34 Vict. c. 49.

<sup>o</sup> Ord. xxxviii. 1, p. 314.

<sup>p</sup> Ord. xxxviii. 2, p. 314.

Ord. xxxviii. 3, p. 314.

<sup>r</sup> Ord. xxxviii. 4, p. 314.

<sup>s</sup> Ord. xxxviii. 5, p. 314.



this practice must be printed, and when this practice is followed the next step in the action, viz., notice of trial, cannot be given until after all the evidence is filed, the close of the evidence being thus put in the place of the close of the pleadings.<sup>†</sup>

The use of affidavits for the purpose of taking the evidence in the action is the most formal and regular proceeding in which they take part, but affidavits are constantly employed in interlocutory applications where the main issues in the action are not in question, but facts have to be proved upon the hearing of a motion or summons for incidental purposes, such as obtaining the inspection of documents, or the interim protection of property. Affidavits were always used for such purposes at common law as well as in Chancery, and they are put to the same use in the Supreme Court, subject to the liability of the deponent to attend and be cross-examined under an order. Questions of fact are generally so little in dispute on interlocutory applications, that a relaxation of the strict rules of evidence is allowed, and the affidavits may contain statements of the belief of the deponent. Upon interlocutory applications notice of the filing of affidavits is sometimes given between the parties, but frequently the counsel or solicitor on one side merely hands them to his opponent before the matter is brought on in order to give him an opportunity of inspecting and remarking upon them.

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<sup>†</sup> Ord. xxxviii. 6, p. 315.

If there be a dispute concerning facts which the Court thinks ought to be further inquired into, it possesses the power, which it sometimes exercises, of directing an issue to try the question, or of referring it to the Master or other officer to inquire into and report upon. When this is done, the Master will hear the case and make his report, which either side is at liberty to move for, or object to, after it has been produced and read. This mode of arriving at the truth was formerly sometimes adopted in the Common Law Courts by reason of the strict rule, that the party applying for the intervention of the Court was limited to the evidence which he adduced in the first instance, and was entirely precluded from offering fresh affidavits in answer to those of his opponent. This direct premium to unscrupulousness held out to the party who swore last, was in some measure removed by the Common Law Procedure Act, 1854,<sup>u</sup> which provides that either party, with leave of the Court or a judge, may make affidavits, in answer to the affidavits of the opposite party, upon any new matter arising out of such affidavits. Upon the hearing of any motion or summons, it is also open to the Court or judge to order the production of any necessary documents, and the appearance of any necessary witnesses to be examined *vivâ voce*, either before the Court, or a judge, or before a Master; and upon hearing the evidence, or reading the report of the Master, the matter will be disposed of by rule or order, as may be just.

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<sup>u</sup> 17 & 18 Vict. c. 125, ss. 45 and 46.

Although it is a *primâ facie* rule that in the absence of consent the evidence in the action shall be given orally and in open Court, an order may be made allowing any particular fact or facts to be proved by affidavit, or allowing the affidavit or examination on interrogatories of a particular witness to be read at the trial. This order, however, is not made, if it appear that there is a *bonâ fide* desire on the part of the opposite party to cross-examine the witness.<sup>2</sup> In aid of the extraction of evidence by affidavit there is a general power to order witnesses to be examined before an examiner.<sup>3</sup>

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<sup>2</sup> Ord. xxxvii. 1, p. 313.

<sup>3</sup> Ord. xxxvii. 4, p. 313.

## CHAPTER VI.

### INTERLOCUTORY APPLICATIONS.

INTERLOCUTORY applications are proceedings taken during the progress of the action for the purpose, in general, of assisting either party in the prosecution of his case, or of obtaining an interim order with reference to the subject matter of the dispute. Several forms of interlocutory applications have already been mentioned, such as the application for leave to employ substituted service and for leave to amend pleadings, and it is now time to point out how these applications are made, and to refer in detail to certain of the most important of them.

Applications for interlocutory orders are generally made, in the first instance, to a judge at Chambers or some official of the Court, who in certain matters acts as his deputy. Except in a few *ex parte* proceedings they are begun by summons, which is a document issued in the name of the judge or officer and calls on the party interested to show cause why the order asked for should not be made. The summons is left at the party's address for service. If the party taking out the summons intends to attend by counsel, he should

give notice of his intention to his opponent at the time of the service of the summons ; and if the latter intends to appear by counsel to oppose the summons, he must give to the party taking out the summons the best notice he can of such intention before the return of the summons. The summons operates as a stay of proceedings from the time at which it is attendable until disposed of.

On the return day of the summons in the Queen's Bench, Common Pleas, and Exchequer Divisions of the High Court, the parties, or their solicitors, or counsel, go before one of the Masters, and in the Probate, Divorce, and Admiralty Division before a Registrar, except in certain specified cases. These cases are applications for the removal of an action from one division to another, for the settlement of issues, except by consent, to rescind an order of a District Registrar, for an injunction and for an order for costs.<sup>a</sup> In interpleader cases the Masters have jurisdiction, except where the matter is finally determined without an issue or special case. By consent of parties they have jurisdiction in all interpleader cases. In the Chancery Division the summons is heard before the Chief Clerk, and in some cases before the junior Clerk. The Master, Registrar, or Chief Clerk, after hearing the parties, either makes the order asked for, or makes no order, either with or without costs. He may also, if he may think fit, refer the matter to the judge.<sup>b</sup> If the party on

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<sup>a</sup> Ord. liv. 2, 2a, p. 334, 335.

<sup>b</sup> Ord. liv. 3, p. 335.

whom the summons is served do not appear, the applicant's solicitor, having waited a reasonable time, is entitled to an order. The order, when obtained, must be drawn up and served forthwith, otherwise it may be treated as abandoned. Orders, if unobeyed, are enforced by attachment, the punishment for contempt of Court.

From the Master, Registrar, or Chief Clerk there is always an appeal to the judge in Chambers. An appeal from the order of a Master is made by taking out a summons within four days from the decision.<sup>c</sup> There may be a still further appeal from the judge at Chambers to a divisional Court, which is made by motion within eight days. In the Chancery Division there may be an adjournment of the summons from the judge in Chambers to the judge in Court, which takes place if the judge thinks it had better be heard more deliberately and with the assistance of counsel on both sides.

In the Queen's Bench, Common Pleas, and Exchequer Divisions, an appeal from a judge at Chambers to a divisional Court is made by motion, that is to say, counsel or the party in person moves the Court to rescind the order or to allow what the judge has refused.<sup>d</sup> Two clear days' notice of motion must be given to the opposite party.<sup>e</sup>

Interlocutory applications are so numerous as to make it impossible to describe them all, and so various as to defy classification; but some detailed

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<sup>c</sup> Ord. liv. 4, p. 335.

<sup>d</sup> Ord. liv. 6, p. 336.

<sup>e</sup> Ord. liii. 4, p. 333.

account may be given of the most frequent and important of them.

The commonest kind of interlocutory application, is the application for time. As we have already seen, the steps in an action have to be taken within a certain prescribed time, but the party who has to take the step often finds that the time limited is insufficient. The time prescribed is almost invariably made subject to an order, but the applicant obtaining the order, in this as in all other cases where the grant of the application is a matter of favour, is, if desired by his opponent, placed under terms, as, for instance, that he take short notice of trial.

Another very numerous class of interlocutory applications is for particulars, when either party alleges that his opponent's pleading is too vague, and desires to know more precisely what are the items of his claim, set off, or the like. Applications of this class were more numerous under the former than the present system.

Of a converse nature to a summons for time is the application to set aside proceedings for irregularity. Thus there are certain rules which regulate the time of entering judgment, and if judgment be entered before the time prescribed, it will be set aside for irregularity. And so, in every case, where a rule or regulation of the Court is infringed, the proceeding which infringed it will be set aside, on application. Every application on this score must be made as speedily as possible, and it will not be acceded to if the party applying

has taken a fresh step after knowledge of the irregularity.<sup>g</sup>

Of the more important kinds of interlocutory proceedings, the commonest are those arising out of discovery and inspection. Discovery is a proceeding by a party to an action for the purpose of obtaining the disclosure of facts or documents from his opponent.

The discovery of facts is obtained by interrogatories or written questions, which a plaintiff or a defendant may deliver to his opponent at any time before the close of the pleadings,<sup>h</sup> although interrogatories before statement of defence are discouraged. It may be of the utmost importance to the party to obtain this discovery from his opponent, in order that he may be able to frame his pleadings correctly, or prepare his case for the trial, or obtain evidence of facts within the knowledge of his opponent only, without making him a witness subject to the cross-examination of his own counsel at the trial. After the pleadings are closed interrogatories cannot be delivered without an order permitting them. Upon delivery of the interrogatories the opposite party must either answer them by affidavit, to be filed within ten days,<sup>i</sup> or must within four days from their delivery apply for an order to have the interrogatories struck out.<sup>k</sup> If it be shown that the interrogatories have been exhibited unreasonably or vexatiously, or that

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<sup>g</sup> R. 135, H. T., 1853.

<sup>h</sup> Ord. xxxi. 1, p. 297.

<sup>i</sup> Ord. xxxi. 6, p. 298.

<sup>k</sup> Ord. xxxi. 5, p. 298.



any of them is scandalous, that is, that it contains matter introduced merely for the purpose of giving pain, they or it will be struck out.<sup>1</sup> Moreover, when the costs of the action come to be taxed, if it appear that interrogatories have been administered unreasonably, vexatiously, or at improper length, the costs may be ordered to be borne by the interrogating party.<sup>m</sup> An objection to answering an interrogatory may also be taken in the affidavit filed in answer. In answering the interrogatories the deponent may object to answer any particular question on the ground that it is scandalous or irrelevant, that is that it has no bearing on the issues in the action, or that it is not put *bonâ fide* for the purposes of the action. If no answer be filed, or if it be in the opinion of the interrogating party insufficient, an order may be made requiring an answer or a further answer. The order may require the answer to be made *vivâ voce*.<sup>n</sup> When it is desired to interrogate a corporation an order is required, and an officer or member of the corporation is named for the purpose of making the affidavit.<sup>o</sup>

Equally important with the extraction of facts from an adversary, is the discovery of documents, or the power of compelling him to disclose what documents there are or have been in his possession or control relevant to the case. Any party may without filing an affidavit obtain an order directing

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<sup>1</sup> Ord. xxxi. 5, p. 298.

<sup>n</sup> Ord. xxxi. 10, p. 298.

<sup>m</sup> Ord. xxxi. 2, p. 297.

<sup>o</sup> Ord. xxxi. 4, p. 297.

any other party to the action to make an affidavit giving a list of these documents.<sup>q</sup> So soon as he knows of the existence of a document, the opposing party will of course wish to see it, and therefore the affidavit of documents is required to state which, if any, of the documents it is objected to produce.<sup>r</sup> The production for the purpose of inspecting and copying the documents disclosed in the affidavit of documents, or referred to in the opposite party's pleadings or affidavits, may be enforced by merely giving a written notice, and if the notice be not complied with, the defaulting party is not permitted to give the document in question in evidence without a sufficient explanation.<sup>s</sup> When the notice to produce the documents has been given, the practice is for the party in whose possession or control they are, to appoint a time and place for their inspection. If he object to the inspection, he must state the documents to which his objection applies, and the ground of it.<sup>t</sup> If the notice be not given, or if it be accompanied by an objection, an order for inspection may be applied for.<sup>u</sup> Sometimes a party may have reason to believe that documents are in the possession of his opponent which have not been mentioned in the affidavit of documents, or in the pleadings or other affidavits. In that case, if he apply for an order for inspection he must be provided with an affidavit of the circumstances.<sup>x</sup> Whether or not

<sup>q</sup> Ord. xxxi. 12, p. 298.

<sup>r</sup> Ord. xxxi. 13, p. 299.

<sup>s</sup> Ord. xxxi. 14, p. 299.

<sup>t</sup> Ord. xxxi. 15, p. 299.

<sup>u</sup> Ord. xxxi. 16, p. 299.

<sup>x</sup> Ord. xxxi. 17, p. 299.

<sup>y</sup> Ord. xxxi. 18, p. 300.

<sup>z</sup> Ord. xxxi. 19, p. 300.

<sup>aa</sup> Ord. xxxi. 20, p. 300.

<sup>ab</sup> Ord. xxxi. 21, p. 300.

a party shall be ordered to allow a document to be inspected is entirely in the discretion of the judge, who decides as the justice of the case may require, and for that purpose may order the document to be produced to him.<sup>7</sup>

Failure to answer interrogatories, or to discover or permit inspection of documents, may be visited with attachment. The defaulter is also liable to have his defence struck out or his action dismissed.<sup>8</sup> The general rule, that attachment for disobedience to an order will not be made without personal service of the order, is relaxed in favour of the right of discovery, and service of the order on the solicitor is sufficient; but the attachment will not be made if it appear that the party has in fact had no notice of the order.<sup>9</sup> In that case the solicitor may be attached for not bringing the order for discovery or inspection to his client's knowledge.<sup>b</sup>

Somewhat analogous to proceedings by way of discovery is the taking of witnesses' depositions in writing for use at a trial with oral evidence. If a witness be in India, or in any of her Majesty's colonies or dominions abroad, the Court can grant a writ in the nature of a mandamus to the tribunals there to examine him and return his examination to this country; and if the witness be in any of such places, or in a foreign state, an order may be made for the issue of a commission, which is a document empowering some person to take evidence out of the jurisdiction of the Court. When

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<sup>7</sup> Ord. xxxi. 11, p. 298.

<sup>8</sup> Ord. xxxi. 20, p. 300.

<sup>9</sup> Ord. xxxi. 21, p. 300.

<sup>b</sup> Ord. xxxi. 22, p. 300.

the witness is in England, but will be unable to attend the trial by reason of illness or absence beyond the jurisdiction, an order may be made that he be examined before some person, whether or not an officer of the Court.<sup>c</sup> Where evidence is taken within the jurisdiction, or in any of the Queen's dominions abroad,<sup>d</sup> there are compulsory powers to enforce the attendance of witnesses, but when a commission issues to a foreign state the attendance of witnesses is voluntary.

An occasional but rare application is that of a party, to be allowed to proceed "in formâ pauperis." This privilege was first given by a statute of Henry the Seventh<sup>e</sup> to plaintiffs suing in the Common Law Courts, and an analogous practice arose in Chancery, where it was extended to defendants. The application may be made either before suing or in the course of the action, and the applicant must make an affidavit that he is not worth five pounds except his wearing apparel, and, if a plaintiff, the matter in question in the action. He must also, if a plaintiff, produce a certificate of counsel that the action is proper to be brought,<sup>f</sup> together with an affidavit that the facts were truly stated to the counsel.<sup>g</sup> The order is a discretionary indulgence, and will not be granted if likely to be used for vexatious purposes. Its effect is to relieve the pauper litigant from the payment of

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<sup>c</sup> 1 Wm. IV. c. 22, reciting 13 Geo. II. c. 63.

<sup>d</sup> 22 Vict. c. 20.

<sup>e</sup> 11 Hen. VII. c. 12.

<sup>f</sup> Cons. O. Ch. 7.

<sup>g</sup> R. 121, H. T., 1853.

Court fees, and to assign to him a counsel and a solicitor. If he fail, he does not pay costs to the opposite party; but if he succeed, he obtains no costs, except money out of pocket. A pauper may at any time be dispaupered if the order were improperly obtained, or if he turn it to purposes of vexation, or if he obtain property.

The interlocutory applications already noticed may be made either by a plaintiff or a defendant, but there are certain applications which are made particularly by the defendant. The most important of these is the application to remit the case to a County Court, which the defendant frequently makes when the claim is for a small amount, or he has reason to believe that the plaintiff is not a sufficiently substantial person to pay the costs of an action in the High Court if he should fail. If the action be an action of contract, and the claim do not exceed £50, the defendant may, within eight days from the service of the writ, apply for an order, referring the case to the County Court in which the action might have been commenced. If the plaintiff cannot show good cause to the contrary, the order will be made and the case tried in the County Court accordingly.<sup>b</sup> If the action be an action of tort, however large the claim, the defendant may apply for an order remitting it to a County Court, without any restriction of time, upon an affidavit that the plaintiff has no visible means of paying the costs of the defendant if he

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<sup>b</sup> 30 & 31 Vict. c. 142, s. 7; Jud. Act, 1873, s. 67.

should fail in the action. The order will be made unless the plaintiff give security for costs, or satisfy the judge that he has a cause of action fit to be prosecuted in the High Court.<sup>a</sup>

In actions of contract<sup>r</sup> or claims in equity, there is a further power belonging either to the plaintiff or the defendant to apply for an order remitting the case to a County Court. This is done after issue joined, and claims reduced to £50 by payment into Court, as well as claims which might originally have been brought in the County Court, may be remitted. Claims in equity which might have originally been preferred in the County Court, that is, generally, where the subject matter does not exceed £500, may also be remitted.<sup>s</sup>

It frequently happens that an action resolves itself into a mere matter of account, and in that case the ordinary forms of procedure and trial which are not convenient for the determination of such matters are supplanted by a compulsory reference to arbitration, for which certain clauses of the Common Law Procedure Act, 1854, still frequently brought into use, and the Judicature Act, 1873, provide. The judge, on the application of either party, may decide such an action in a summary way, or may refer it wholly or in part to an arbitrator, appointed by the parties, or to an officer of the Court.<sup>t</sup> The question of the allowance

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<sup>a</sup> 30 & 31 Vict. c. 142, s. 10.

<sup>r</sup> 19 & 20 Vict. c. 108, s. 26.

<sup>s</sup> 30 & 31 Vict. c. 142, s. 8.

<sup>t</sup> 17 & 18 Vict. c. 125, ss. 3-10.

of particular items may be stated in a special case if it be matter of law, or be referred to a jury for the guidance of the arbitrator, or the arbitrator may himself state a special case. The necessary powers of summoning witnesses and conducting the trial of the arbitration are given to the arbitrator, and his award may be enforced like the verdict of a jury. The matter may in a proper case be sent back again to the arbitrator, and within the first seven days of the "next term" a motion to set aside the award will be entertained if either party think he can show grounds on which awards are usually set aside. The old division of the legal year into terms, is, as will be seen, kept alive as a measure of time for moving to set aside awards.<sup>u</sup> The action cannot be wholly referred if it consists in part only of matters of account.<sup>x</sup> Powers of compulsory reference to an official or special referee, including matters requiring the prolonged examination of documents or local investigation, as well as questions of account are given by the Judicature Acts,<sup>y</sup> but under these powers, issues and questions upon which the referee must find specifically are referred, and the referee cannot order judgment to be entered, but makes a report.<sup>z</sup>

Similarly, where an action has been brought in breach of an agreement to refer disputes to

<sup>u</sup> *Governors, etc., Brecknock v. Martin*, 46 L. J. Q. B. 591; L. R. 3 Q. B. D. 16.

<sup>x</sup> *Clow v. Harper*, 47 L. J. Q. B. 393.

<sup>y</sup> Jud. Act, 1873, ss. 50-59.

<sup>z</sup> *Longman v. East*, 47 L. J. Q. B. 211.

arbitration, an application may be made to stay the proceedings which ought never to have been begun. It is a common practice to insert in partnership and other agreements, a clause that any disputes arising between the parties shall be referred to arbitration. Before the Common Law Procedure Act, 1854, this clause was in general useless, unless the parties remained in the same mind when the dispute did arise, by reason of the technical rule of law, which precluded parties from ousting the Courts of jurisdiction by such a previous agreement.<sup>†</sup> By the Common Law Procedure Act, 1854, if persons agree in writing to refer existing or future differences to arbitration, and any of them, or any person claiming under them, afterwards bring an action in respect of such differences the proceedings may be stayed by an order.<sup>‡</sup> The application to stay the proceedings must be made after the appearance and before the statement of defence. The defendant on making the application should show that at the time of the commencement of the action or suit he was and is ready and willing to join and concur in all acts necessary and proper for causing the matters in difference to be decided by arbitration, but the exercise of the jurisdiction is a matter of discretion. The Court refused to stay proceedings under this provision where the plaintiff *bonâ fide* alleged that the question raised was one of fraud.<sup>§</sup>

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<sup>†</sup> See *Crisp v. Bunbury*, 8 Bing. 394.

<sup>‡</sup> 17 & 18 Vict. c. 125, s. 11.

<sup>§</sup> *Wallis v. Hirsch*, 26 L. J. C. P. 72.



Independently of the County Court Acts or other statutes it is open to the defendant to apply under certain circumstances for an order staying proceedings unless the plaintiff give security for costs. A plaintiff, however, cannot make this application against a defendant, and a defendant who admits the plaintiff's claim but puts in a counter-claim for a larger sum, is in an analogous position, and cannot obtain security.<sup>7</sup> If the plaintiff, whether suing in an individual or in a representative capacity, and whether for his own benefit or that of another, permanently reside abroad out of the jurisdiction of the Court, but not if he reside in Scotland or Ireland,<sup>8</sup> the Court or a judge will stay the proceedings in the action until he give security for costs to the satisfaction of an officer of the Court. Where, however, there are several plaintiffs if any one of them reside here, the security will not in general be ordered to be given. But an order may be made in an action by husband and wife for a personal injury to the wife, if the husband be resident abroad, although the wife be resident here. The absence abroad must be of a permanent kind; and where the absence is of a mere temporary nature, as in the case of an English seaman serving on board an English or foreign vessel constantly sailing to and from this country, he will not be compelled to give this security. It perhaps may be taken as a rule that where the plaintiff will be absent beyond the time when judgment

<sup>7</sup> *Winterfield v. Bradnum*, 47 L. J. Q. B. 270; L. R. 8 Q. B. D. 324.

<sup>8</sup> *Raeburn v. Andrews*, 43 L. J. Q. B. 78; L. R. 9 Q. B. 118.

could, in the ordinary course of proceeding, be obtained against him, his absence will be considered permanent. Security for costs will not be required to be given on the ground of the plaintiff's absence abroad, when such absence is not voluntary, and the plaintiff is an Englishman ; as in the case of naval and military officers, and others engaged abroad in the public service. It seems, although there are cases to the contrary, that a plaintiff domiciled abroad will not be compelled to give security for costs while he is in this country. A foreigner in this country, though his permanent residence be abroad, will not be compelled to give this security. A peer, whose person is privileged from arrest, or a foreign ambassador or his servant, will not be compelled to give security for costs ; although ambassadors and their suites, by a fiction of the *jus gentium*, are considered as still resident in the state from which they have been sent, and are not amenable to process in the country in which they actually reside. In two cases foreign potentates have been compelled to give security in causes arising out of commercial transactions ; and, in general, the rank of the plaintiff will afford no answer to the application. A foreign railway company is bound to give security for costs, notwithstanding that it has personal property in England, and some of its shareholders reside in England, who are responsible to the extent of their unpaid capital.

The plaintiff will not be compelled to give security for costs merely because he is a pauper, or bankrupt, or insolvent. Nor will such security

be compelled, though he become bankrupt after action brought, unless the trustees interfere, and the action is carried on for their benefit. But a plaintiff will be ordered to give security for costs, if he be in insolvent circumstances, and sue not for his own benefit, but for that of assignees, to whom he has assigned his property in trust for the benefit of his creditors. It may also be taken as a general rule, that where another person is, in fact, proceeding with an action in the name of the party on the record, and that party is in a state of pauperism and insolvency, the Court will stay the proceedings until security for costs be given. Where a limited company is plaintiff and there is reason to believe that if the defence be successful the assets will be insufficient to pay the defendant's costs, security for costs may be required.<sup>a</sup> But where an order has been made for the compulsory winding up of an insolvent joint stock company, and an action is brought by the official liquidator in the name of the company to recover money due to the company, the defendant is not entitled to call upon the plaintiff to give security for his costs.<sup>b</sup> An executor or the trustee of a bankrupt who is suing as trustee for the benefit of the estate, will not be compelled to give security for costs, upon the ground that he is poor and unable to pay the defendant's costs.<sup>c</sup> If the plaintiff is convicted of

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<sup>a</sup> 25 & 26 Vict. c. 89, s. 89.

<sup>b</sup> *United Ports Insurance Company v. Hill*, 39 L. J. Q. B. 227 ; L. R. 5 Q. B. 395.

<sup>c</sup> *Denston v. Ashton*, 38 L. J. Q. B. 254 ; L. R. 4 Q. B. 590.

felony and under sentence of transportation, he may be ordered to give security for costs. Lunacy of the plaintiff is no ground for requiring such security. When the defendant is quasi a plaintiff, as in replevin, and he reside abroad, he may be compelled to find security for costs. So he may be compelled to find security when he resides abroad in an issue under the Interpleader Act. But, in other actions, the defendant will not be compelled to give such security. The application for the security cannot be made before the defendant has appeared. It should ordinarily be made before issued joined.<sup>d</sup>

A converse application to that of the defendant to compel the plaintiff to give security for costs is an application by the plaintiff to hold the defendant to bail, when he is about to quit England. This is now the only remnant of what was formerly the most ordinary mode of proceeding for the recovery of debts, and is taken under the Debtors' Act, 1869, which abolished arrest on mesne process, and provided a new proceeding, available only against absconding debtors. It applies only to actions in which formerly the defendant would have been liable to arrest. The application may be made at any time before final judgment, and the plaintiff must prove to the satisfaction of a judge that he has a good cause of action against the defendant to the amount of 50*l.* or upwards, and that there is probable cause for believing that the

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<sup>d</sup> R. 22, H. T., 1853.

defendant is about to quit England, and that his absence will materially prejudice the plaintiff in the prosecution of his action. An order may then be made committing the defendant to prison for any term not exceeding six months, until he has given security to an amount not greater than the claim, that he will not go out of England without leave of the Court.\* In penal actions, in which arrest on final process is still retained, the plaintiff need not prove that the absence of the defendant will materially prejudice him in the action, and the security is to the effect that any sum recovered shall be paid, or the defendant rendered to prison.

The strictness of the proof required does not make this proceeding very frequently available, and the process is chiefly interesting as throwing light on former methods of procedure in civil actions. A curious history belongs to the "actions in which formerly a defendant would have been liable to arrest."

Anciently, arrests were only allowed in actions of trespass, which were thought to partake of a criminal nature. Afterwards the power to arrest was extended by the Legislature to some other actions; and at length a legal fiction was invented, by which the defendant was arrested, ostensibly for a trespass, but really for any other cause of action. When this practice came to be fully recognised, a defendant might have been arrested for any cause of

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\* 32 & 33 Vict. c. 62, s. 6.

action, however paltry ; and this manifest hardship occasioned the passing of several statutes,<sup>d</sup> the effect of which was, that no one was permitted to be arrested for any cause except a debt, without the special order of a judge. Thus the law of arrest was so completely altered, that the cases in which arrests were allowed as of course became those in which they were anciently never allowed at all, namely, of debts, while in actions of trespass in which alone an arrest was allowed at common law, the special order of a judge was required to sanction it. If the plaintiff was willing to swear to a debt to the amount of 20*l.* he might arrest the defendant ; but if he made such affidavit inconsiderately, he ran the risk of an action for a malicious arrest and an indictment for perjury. Previously to the Debtors' Act, 1869, an important change was introduced into the law upon this subject in the first year of the Queen,<sup>e</sup> and the writ of *capias* by which the defendant was arrested became no longer, as formerly, a means of commencing an action. Its effect has now, as we have seen, been still further curtailed by the Debtors' Act.

There are some cases where the defendant, by reason of the dignity of his station, or of other circumstances, is privileged from arrest. The royal family, the queen's servants, peers, and peeresses, are so privileged. There is a curious case in Fortescue's Reports<sup>f</sup> relating to the privilege of

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<sup>d</sup> See 12 Geo. I. c. 29 ; 7 & 8 Geo. IV. c. 71.

<sup>e</sup> 1 & 2 Vict. c. 110.

<sup>f</sup> *Lord Mordington's case*, Fort: 165.

peers, in which the bailiff who arrested a lord was forced by the Court to kneel down and ask his pardon, though he alleged that he had acted by mistake ; for that his lordship had a dirty shirt, a worn-out suit of clothes, and only sixpence in his pocket ; so that he could not believe he was a peer, and arrested him through inadvertence. In the few cases of the sort which have since happened, the Courts have contented themselves with discharging the noble defendants on motion. As to ambassadors, there is a statute passed in the reign of Queen Anne,<sup>s</sup> which not only makes all process against them null and void, but renders it a crime to arrest them ; and appoints the chancellor and two chief justices a Court, with power to inflict any corporal punishment they please upon the party doing so. This Act, which is remarkable as being the only instance in the English law in which the nature of the punishment is left entirely to the judge's discretion, was passed to pacify Peter the Great of Russia, whose ambassador had been arrested in the street, and who threatened to make war upon Great Britain, in consequence of the refusal of our government to hang the two sheriffs of London, the plaintiff, the plaintiff's attorney, and the bailiff who made the arrest. Other public ministers of foreign princes or states at this Court, and their suites and domestic servants, are also protected from arrest by this statute. Members of the House of Commons are so privileged during the session of

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<sup>s</sup> 7 Anne, c. 12.

parliament, and for a convenient time, it seems forty days, before and after it, and it appears that members of convocation enjoy the same privilege as members of the House of Commons. The judges are privileged from arrest. Solicitors and officers of the Court, as they lose their privilege from arrest when they are about to leave the country, may be arrested in the same way as other persons. A married woman cannot in general be held to bail. Nor can, in general, executors, administrators, and heirs in actions against them for the debts of the deceased.

It should here be noticed, that some persons have a temporary privilege from arrest. Thus, persons connected with a cause, and attending in the course of it, whether compelled to attend by process or not, such as parties, witnesses, bail, and solicitors, are privileged from arrest whilst going to, attending, and returning from Court, or a judge at Chambers. Barristers enjoy the same privilege whilst attending upon the Superior Courts for the purpose of being engaged in the business of the same. Also, a barrister whilst on circuit is privileged from arrest, and this whether he has business or not. Clergymen likewise are so privileged whilst performing divine service, and while going to church for that purpose and returning thence. A bankrupt also has a temporary privilege in this respect for a certain time during the pendency of the bankruptcy proceedings.

A defendant may be held to bail for a debt or



money demand, as for goods sold and delivered, or money lent. So he may be held to bail in an action for unliquidated damages, but in such case it must be made clearly to appear on affidavit, that the damages sustained are 50*l.* or upwards. So a defendant may be held to bail in an action on a bond, unless it be a replevin or a bail bond. If it be a bond conditioned for the payment of money, the defendant should be held to bail merely for the principal and interest due on it, and not for the penalty. Before the Debtors' Act, 1869, the defendant, in actions for tort, could not, in general, be held to bail, but in some cases, as where it was made to appear on affidavit that the damages sustained by the plaintiff exceeded 50*l.*, and in actions for very violent and cruel assaults, and for mesne profits, defendants were sometimes held to bail. The Debtors' Act, while, on the one hand, it limits holding to bail to the case of an absconding defendant, on the other extends it to all actions in which a cause of action to the extent of 50*l.* is proved.

The application to the judge is made *ex parte*, and the order, if made, is taken to the sheriff and treated like a writ of execution. It must be executed within a month from its date, and the defendant may at any time apply to rescind the order or be discharged from custody. The security given by the defendant may be a deposit of the amount or a bond with two sureties.<sup>b</sup>

A writ of *ne exeat regno*, a high prerogative

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<sup>b</sup> R. 7, M. T., 1869.

writ, having its origin in political objects, but issuing formerly from the Court of Chancery in aid of civil rights, is a similar proceeding to that just described. It must be expressly prayed for in the action, and is granted on motion upon proof of a debt due from the defendant and that he intends to abscond.

Another ordinary application on the part of defendants is, that several actions may be consolidated, they undertaking to abide by the event of one of them. This application is most frequently made in actions against underwriters upon a policy of insurance, where, as the question is the same against each underwriter, it was usual for the defendants to move for what was called the "consolidation rule," a rule which was invented by Lord Mansfield, and the effect of which was to bind the defendants in all the actions by the verdict in one. This practice is now adopted in the High Court, and an order may be applied for in the ordinary way.<sup>1</sup> The jurisdiction will generally be exercised where many actions are oppressively and vexatiously brought by the same plaintiff, for the purpose of trying the same questions, or where several actions can be conveniently decided in a representative case. Similarly an interlocutory application may be made for the transfer of an action from one Division of the High Court to another, either in order that it may be consolidated with another action or "matter" in

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<sup>1</sup> Ord. li. 4, p. 331.

another Division, or because another Division is better able to decide the case.<sup>1</sup>

Another kind of interlocutory application generally made by the defendant is to change the place of trial, or the "venue" as it was formerly called. Although venue has been abolished it is still necessary, for the purpose of understanding the legal principles on which the place of trial is fixed, to be acquainted with some of the rules relating to it.

The venue was the county mentioned in the margin of the declaration, and it was said in certain cases to be "local," and in others to be "transitory." The venue was local when it was said that the cause of action could not have taken place in any other county, as, for instance, in actions of trespass *quare clausum fregit*; it was transitory where the cause of action might have happened in another county, as in actions of trespass for assault and battery. Some actions were, moreover, rendered local by particular statutes. At common law, the rule was, that in a transitory action the plaintiff might lay the venue wherever he pleased. But this was found to create so much vexation, in consequence of plaintiffs laying venues at a great distance from the defendant's residence, that it was enacted by statute<sup>2</sup> that the venue should be laid in the county where the cause of action arose. And, after several other modes of enforcing this statute had been

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<sup>1</sup> Ord. li. 2, p. 380.

<sup>2</sup> 2 Rich. II. c. 2.

ineffectually tried, the Courts, in the reign of James the First, introduced the practice of changing the venue in a transitory action to another county, upon affidavit that the cause of action, if any, arose in another county, and not in the county in which the venue was laid, or elsewhere out of that other county. This was called the common affidavit, and on it the order to change the venue was obtained as a matter of course, subject to the plaintiff being permitted to bring back the venue, on his undertaking to give material evidence in the county in which he first laid it; and if he failed in performing this, he was nonsuited.

There were many cases, even of transitory actions, in which it was held that the defendant could not possibly make the common affidavit; for instance, in actions on bills of exchange, promissory notes and specialties, the reason of which is, that there is a maxim of law—*contractus est nullius loci*;<sup>1</sup> so that it was held, with what accuracy it is not the present object to enquire, that in such cases, the cause of action cannot be said to have arisen in one county more than another. However, in these cases, though the Courts would not allow the venue to be changed upon the common affidavit, they would change it on an affidavit setting forth some good reason, as, for instance, that all the witnesses lived in the county to which it was proposed to change the

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<sup>1</sup> 2 Inst. 231.

venue, or that a fair trial could not be had in the county laid. Considerations of this latter kind are now likely to weigh most with the Court to which a general discretion is given to order the place of trial to be changed.<sup>m</sup>

The institution of District Registries, with jurisdiction over all proceedings up to notice of trial, introduces a form of interlocutory application for the removal of a case from the registry, which is somewhat analogous to altering the place of trial. In certain circumstances a defendant is entitled to remove the case without any application, that is, where the writ is specially endorsed and the plaintiff does not, within four days from the defendant's appearance, apply for speedy judgment without trial, a proceeding which will hereafter be explained, or an unsuccessful application of this kind has been made, or the writ is not specially endorsed at all.<sup>n</sup> A removal of the case as of right takes place by the defendant giving a notice to the other parties to the action and to the District Registrar.<sup>o</sup> If there be sufficient reason for removing the action, any party may apply for an order to do so, and, conversely, an order may be made for removing the action from London to a District Registry.<sup>p</sup>

A new form of interlocutory proceeding in favour of the defendant is supplied by the Judicature Acts in providing for the introduction of third

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<sup>m</sup> Ord. xxxvi. 1, p. 306.

<sup>o</sup> Ord. xxxv. 12, p. 305.

<sup>n</sup> Ord. xxxv. 11, p. 305.

<sup>p</sup> Ord. xxxvi. 12, p. 308.

parties into an action. A third party is a person against whom a defendant has a claim for contribution or indemnity in respect of the claim of the plaintiff, or who has such an interest in the action as to make his presence before the Court desirable.<sup>¶</sup> When a defendant makes such a claim, he may obtain an order to issue a notice to the third party, which must state the form and grounds of the claim, and is in the nature of a writ at the defendant's suit. With the notice, which ordinarily must be given within the time allowed for delivering the defence, is served the statement of claim in the action, or the writ, if there be no statement of claim.<sup>†</sup> Where no claim against a third party is made by the defendant, an order may be made, directing the plaintiff to serve such a notice, if it appear desirable to the Court or a judge that a third party should be brought into the action.<sup>‡</sup> The third party must enter an appearance in the action within eight days, otherwise he will be bound by the decision in the action, so that if the defendant subsequently take proceedings against him, he will not be able to dispute the validity of the judgment given against the defendant in the original action. Power was given by the Judicature Act of 1873<sup>§</sup> to dispose of the whole matter having a three-sided aspect in the action first brought; but as this would necessitate the plaintiff waiting for his judgment until the defendant and the third party had decided who

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<sup>¶</sup> Ord. xvi. 17, p. 274.

<sup>†</sup> Ord. xvi. 18, p. 275.

<sup>‡</sup> Ord. xvi. 19, p. 275.

<sup>§</sup> Sect. 24 (3).

was ultimately liable, notwithstanding that the claim of the plaintiff as against the defendant was clear, the judges did not provide a machinery for this purpose in the Rules of Procedure.

An interlocutory order for the preservation or custody of the subject matter of litigation may be made where a *prima facie* liability under a contract has been made out by the plaintiff, and the defendant does not deny the contract, but sets up a right to be relieved from it. Under such circumstances the amount in dispute may also be ordered to be brought into Court.<sup>u</sup> The application for this order may be made as soon as the circumstances appear on the pleadings, or if there be no pleadings they may be proved on affidavit.<sup>v</sup> Without any restriction to claims in contract the Court may also make an order for the detention or preservation of property in litigation. An order for its inspection may also be made, samples may be taken from it, and experiments tried under the same authority. For the purpose of enforcing such orders, entry upon any land or building in the possession of one of the litigants may be authorised.<sup>x</sup> Goods of a perishable nature may also be ordered to be sold, and the proceeds paid into Court.<sup>y</sup> The Court has also full discretion to grant an interlocutory mandamus, or injunction, or appoint a receiver.<sup>z</sup> In doubtful cases an interlocutory injunction or mandamus is

<sup>u</sup> Ord. lii. 1, p. 331.

<sup>v</sup> Ord. lii. 5, p. 332.

<sup>x</sup> Ord. lii. 3, p. 331.

<sup>y</sup> Ord. lii. 2, p. 331.

<sup>z</sup> Act of 1873, s. 25.

not granted if the applicant can be sufficiently compensated by damages, supposing he be found entitled to an injunction at the trial. These applications may be made either *ex parte* or with notice to the other side. Applications for the preservation, detention, inspection, or sale of property, require a notice to the opposite party.<sup>a</sup> It sometimes happens that the title to a specific chattel is not disputed, but one party sets up a claim by way of lien upon it, that is, says that he is entitled to be paid so much money before giving up the chattel. In that case, an order may be made authorising the chattel to be given up by the person claiming it on payment into Court of the sum with which it is alleged to be chargeable.<sup>b</sup>

It sometimes happens that in the course of the action some of the parties either die or have their legal status changed by marriage or bankruptcy. Anciently, by reason of the strictness with which the proceeding by action was viewed, the effect was to abate or determine the action altogether, but the Courts interfered in certain cases to prevent this inconvenience by allowing the judgment to be entered *nunc pro tunc*. They would in general allow this fiction where the entry of judgment had been delayed by the act of the Court. Therefore, if a party died after special verdict, or after a special case had been stated for the opinion of the Court, or after a motion in arrest of judgment, or for a new trial, or after a demurrer set down for argument, and pending the time taken

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<sup>a</sup> Ord. lli. 4, p. 332.

<sup>b</sup> Ord. lli. 6, p. 332.



for argument, or whilst the Court were considering their judgment, the Court would allow judgment to be entered up after his death *nunc pro tunc*, in order that a party might not be prejudiced by a delay arising from an act of the Court. But if the judgment was not entered up by reason of the laches of the party, or those representing him, or by reason of a proceeding in the common course of law, as by proceedings on appeal, or the like, the Court would not allow the judgment to be so entered. The power to enter judgment *nunc pro tunc* still exists, but is in general superseded by a simpler practice, as will presently be explained.

Sometimes, as where an action of slander is brought, and the plaintiff dies before the trial, the cause of action dies with the party, and the action expires beyond power of revival. In cases where the cause of action survives, various statutory enactments have been passed to keep the action alive, and the Judicature Acts provide that the action shall not abate.<sup>c</sup> The principle that if the cause of action survive the action itself does not abate is now the guiding rule on the subject. A simple mode of substituting the successor in interest is provided, and an order may be made for the addition or substitution of the husband, personal representative, trustee, person born during the litigation, or other necessary or proper party.<sup>d</sup> In the same way, on the assignment or devolution of any estate *pendente lite*, the action may be continued by or against the person

<sup>c</sup> Ord. 1. 1, p. 328.

<sup>d</sup> Ord. 1. 2, p. 328.

on whom it has devolved.<sup>e</sup> The order is obtained *ex parte*, and must be served on all the parties to the action,<sup>f</sup> but application to discharge the order may be made by the person interested.<sup>g</sup>

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<sup>e</sup> Ord. 1. 3, p. 328.

<sup>f</sup> Ord. 1. 5, p. 329.

<sup>g</sup> Ord. 1. 6, p. 329.

## CHAPTER VII.

## THE TRIAL.

THE pleadings being concluded, and such interlocutory applications as the case may require made, the next step in the order of events is the trial.

There are now five modes in which an action may be tried, derived from the Courts consolidated in the Supreme Court, each of which in general applied one mode of trial to the cases brought before it. The most ancient of these modes of trial is that before a judge and jury, formerly adopted by the Common Law Courts in all cases. Trial by jury is said to have arisen out of the practice of allowing accused persons to clear themselves by means of compurgators, who were friends of the accused willing to take an oath of his innocence. In process of time the compurgators became judges rather than witnesses, but the practice long remained of summoning them from the neighbourhood of the place where the facts to be tried happened as most likely to know the truth of the matter, and on this practice was based much of the now abolished theory of venue. Jurymen are now to act on the evidence brought before

them, but they are still supreme as judges of the fact, unless a Divisional Court interferes to set aside their verdict as being manifestly contrary to the whole bearing of the evidence. The Court of Chancery, however, being in its origin not so much a Court of law as a Court of conscience, did not refer questions of fact to the recognised legal tribunal. The Chancellor determined both the facts and the equity of the case himself, and the Master of the Rolls and the Vice Chancellors followed the same practice. In the Courts of Probate and Divorce questions of fact were also tried before a single judge, being the recognised tribunal of the Roman law to which these Courts, from their ecclesiastical origin, paid deference. In the Admiralty Court, which also paid deference to the Roman law, the judge was, from the special character of the questions tried, assisted by nautical assessors, who are the origin of the assessors now in use. Each of these Courts was from time to time enabled by statute to borrow most of the modes of trial used in the others, but it was not until the Judicature Acts that they were all made available to the suitor as the necessities of his case might require.

The five modes of trial are before a judge and jury, before a judge alone, before a judge with assessors, before a referee alone, and before a referee with assessors.\* In a case of very great importance two or more judges may sit at the trial either with

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\* Ord xxxvi. 2, p. 307.

or without a jury, the trial being then a trial at Bar. Referees are of two kinds, either special or official. Special referees are nominated by the parties or are chosen by reason of their qualifications for the disposal of a particular case, and official referees are officers of the Court already described. Like special referees, assessors are professional or scientific persons chosen to bring their special knowledge to the assistance of the judge or referee.<sup>b</sup> They are appointed by an order which also determines their mode of remuneration. Juries are either common or special, and the qualification of jurymen and the mode of summoning and selecting them are subjects of importance, and some complexity.

Every man in England and Wales, except such specially exempted persons as peers, members of parliament, judicial officers, ministers of religion, practising lawyers and doctors of medicine, who is between the ages of twenty-one and sixty, and who possesses a sufficient property qualification, is liable to serve on juries. He must have ten pounds in lands in fee simple, fee tail or for life, or twenty pounds a year in leaseholds held for twenty-one years, or any longer term, or any term determinable on a life or lives. Or he must be rated as a householder to the poor rate on a value of not less than thirty pounds in Middlesex, or twenty pounds elsewhere, or he must occupy a house containing not less than fifteen windows.<sup>c</sup> There are

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<sup>b</sup> Jud. Act, 1873, s. 56.

<sup>c</sup> 6 Geo. IV. c. 50 ; 33 & 34 Vict. c. 77.

special qualifications in cities and boroughs with Quarter Sessions, and in the city of London no man can be returned to try issues joined in the High Court who is not a householder, or occupier of a shop, warehouse, counting-house, chambers or office, for the purpose of trade, within the city, and does not possess lands, tenements or personal estate of the value of one hundred pounds. The persons above mentioned are qualified to serve as common jurors. A special juror must as an additional qualification be legally entitled to be called an esquire, or be a person of higher degree, or a banker or merchant, or occupy a dwelling-house rated on a value of not less than one hundred pounds in a town containing twenty thousand inhabitants and upwards, or rated on a value of not less than fifty pounds elsewhere, or occupy premises other than a farm, rated on a value of not less than one hundred pounds, or a farm rated on a value of not less than three hundred pounds. Aliens domiciled in England or Wales for ten years or upwards, if in other respects duly qualified, are liable to serve on juries. No man attainted of treason or felony, or convicted of any crime that is infamous, unless he has obtained a free pardon, nor any man who is under outlawry, is qualified to serve on juries. The overseers of parishes and townships have to make out lists of the persons qualified to serve, and have to specify which are qualified as special jurors, and the justices at special sessions have to certify that such lists are correct to the

best of their belief; and the decision of such justices as to the qualification of persons marked as special jurors in such lists is final.<sup>c</sup> No person whose name is on the jury book as a juror is entitled to be excused from attendance on the ground of any disqualification or exemption, other than illness, not claimed by him at or before the revision of the list by the justices.

The lists of jurors are returned to the Quarter Sessions and are formed by the Clerk of the Peace into the Jurors' Book which is delivered to the sheriff for the purpose of summoning the juries. Formerly the jurors were summoned under writs to the Sheriff of a very complicated character, but now they are summoned by a precept of a judge, and in country cases by the precept of the judges of Assize.<sup>d</sup> A printed list or panel of the common and also of the special jurors summoned is kept in the sheriff's office for seven days before the first day of the sittings or assizes. A copy of the panel must be kept in the sheriff's office for the inspection of the parties or their solicitors, and a copy is to be delivered to any party requiring it.

The plaintiff in any action which is to be tried by jury, except replevin, is entitled to have the cause tried by a special jury, upon giving notice in writing to the defendant, at such time as is necessary for a notice of trial, of his intention that the cause be so tried; and the defendant, or the plaintiff in replevin, is so entitled, on giving the

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<sup>c</sup> 33 & 34 Vict. c. 77.

<sup>d</sup> C. L. P. Act, 1852, ss. 105 and 107; 33 & 34 Vict. c. 77.

like notice six days before the day for which notice of trial has been given ; but an order may be made at any time that a cause be tried by a special jury upon such terms as may be thought fit.<sup>a</sup> Where notice has been given to try by special jury, either party may, six days before the commission day, give notice to the sheriff that the cause is to be tried by a special jury, and in default thereof, no special jury need be summoned, and the cause may be tried by a common jury, unless otherwise ordered. Similarly in London, six days before the first day of the sittings, notice must be given to the sheriff that the cause is to be tried by a special jury, or in default no such jury need be summoned, and the cause may be tried by a common jury, unless otherwise ordered.<sup>f</sup> Where the defendant in any case, or plaintiff in replevin, gives notice of his intention to try the cause by a special jury, and the place of trial is in London or Middlesex, upon proof that such notice is given for the purpose of delay, an order may be made that the cause be tried by a common jury, or such other order as to the trial of the cause as may seem fit.<sup>g</sup> The cause must be marked in the associate's book as a special jury cause.<sup>h</sup>

A party who obtains a special jury, though successful in the cause, has to bear all his own additional expenses attendant on a trial by special jury, unless the judge who tries the cause im-

<sup>a</sup> C. L. P. Act, 1852, s. 109.    <sup>f</sup> C. L. P. Act, 1852, s. 112.

<sup>g</sup> C. L. P. Act, 1852, s. 111.    <sup>h</sup> R. 45 H. T., 1853.



mediately after the verdict certify on the back of the record that the case was proper to be tried by a special jury.

Which of the five modes of trial now described shall be adopted is determined in the first instance by the notice of trial, which is the first step taken towards this central event in the cause. If the plaintiff does not give notice of trial within six weeks from the close of the pleadings the defendant may do so,<sup>1</sup> but for obvious reasons it is generally the plaintiff who takes the initiative. The notice may be given with the reply or afterwards, and is a ten days' notice, unless the defendant has agreed to take short notice, that is, four days, or has been put under terms to do so.<sup>2</sup> The notice is entitled in the cause, and names a day of trial either in Middlesex or other county before one of the five tribunals specified. A notice of trial is given as Form 6 in the Appendix. If the plaintiff name a mode of trial other than that of judge and jury, the defendant may give notice that he desires the action to be tried before that tribunal, and if nothing further occurs, that mode of trial will be adopted. Either party may, however, apply for an order to try the case in a different mode from that proposed by his opponent.<sup>1</sup> There is power to direct a trial without a jury in all cases which might without consent of parties have been tried without a jury

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<sup>1</sup> Ord. xxxvi. 4, p. 307.

<sup>2</sup> Ord. xxxvi. 9, p. 308.

<sup>1</sup> Ord. xxxvi. 5, p. 307.

before the Judicature Acts.<sup>m</sup> There is conversely a general power to direct trial with a jury in all cases,<sup>n</sup> and also before a referee or with assessors, subject to the right of trial by jury.<sup>o</sup> There is further power to refer cases to a special or official referee, where the parties consent, or when a prolonged examination of documents or accounts, or a scientific or local investigation is necessary.<sup>p</sup> Different questions in the action may, if thought advisable, be tried by different modes of trial.<sup>q</sup>

The notice of trial being given, the next step is to enter the case for trial. This is generally done by the party giving the notice of trial, but if he neglect to do so on the day of giving the notice, or the day after, and the trial is to take place in London or Middlesex, the other side may do so within four days.<sup>r</sup> If the trial is to take place elsewhere either party may enter it.<sup>s</sup> On entering the case for trial the party must leave two, generally printed, copies of the pleadings in the action, one of which is for the use of the judge. These copies of pleadings stand in the place of the old "*nisi prius* record," which deserves a brief description as the basis of the practice in trials by jury.

The *nisi prius* record was a parchment document, containing a transcript of the "issue," that is, the pleadings up to their close, and was, in

<sup>m</sup> Ord. xxxvi. 26, p. 310.

<sup>n</sup> Ord. xxxvi. 27, p. 310.

<sup>o</sup> Jud. Act, 1873, s. 56.

<sup>p</sup> Jud. Act, 1873, s. 57.

<sup>q</sup> Ord. xxxvi. 6, p. 308.

<sup>r</sup> Ord. xxxvi. 14, p. 309.

<sup>s</sup> Ord. xxxvi. 15, p. 309.

fact, a history of the suit up to the moment of trial. It concluded with an award of a "venue," that is, a writ commanding the sheriff to summon a jury, and with an entry called the "jurata," which stated in effect that the proceedings were respited till some day therein named, unless the judge who was to try the cause should before that day come (as he always did) to the place appointed for the trial. The day named was the day on which according to the ancient practice the case would have been tried.

In very early times, when an issue in fact was joined between the parties, it was tried, not as at present, before a single judge, but at the bar of the Court itself in Term time, as is still sometimes done when a trial at Bar takes place. As it was required that the cause should be tried by a jury of the county where the venue was laid, the Court, in order to procure such a jury, issued the writ of venire, which commanded the sheriff to have twelve good and lawful men from his county in Court upon a day there specified to try the issue; and, on that day, anciently, the issue was accordingly tried before the full Court, the jurors being brought from their own county to the place where the Court was sitting.

When the Court of Common Pleas had become stationary at Westminster, this practice became a hardship to the parties, witnesses, and jurors, whose attendance was requisite, and the Legislature found it necessary to interfere. This was done by utilizing "the justices of assize," who were

judges holding the king's commission for the trial of the real action of assize, which took place in the county in which the land in question lay. The "statute of Nisi Prius"<sup>1</sup> empowered these justices to try other issues, and return the verdicts into the Court above. In order to enable them to do so, the writ of venire was altered, and, instead of ordering the sheriff to bring the jurors to the Court of Westminster, he was ordered to bring them to Westminster on a certain day, "nisi prius," *i.e.*, unless before that day the justices of assize came into the county, in which case the statute rendered it his duty to return the jury, not to the Court, but before the justices of assize. Hence it is that judges are said to sit at nisi prius, and trials to take place at the assizes; though the real actions called assizes long ago became obsolete, and are now, indeed, by Lord Lyndhurst's Act,<sup>2</sup> abolished altogether.

Some further considerations demand the attention of the parties before the trial. In actions which concern lands or messuages, and in which it is thought expedient that the jury should have a "view," the officer of the Court will, on application, draw up a rule for the purpose. Two persons are appointed as showers, and six jurymen selected as viewers, and the sheriff returns their names to the associate for the purpose of being called at the trial. Power is also given to either

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<sup>1</sup> 13 Edw. I. c. 30.

<sup>2</sup> 3 & 4 Will. IV. c. 27, s. 36.

party to apply for an order for the inspection by the jury, or by himself or his witnesses, of any real or personal property, the inspection of which may be material for the proper determination of the question in dispute.<sup>2</sup>

So soon as the action is ripe for trial the parties must prepare their briefs and evidence. The brief contains a statement of the pleadings, case, and evidence, for the information of the counsel employed. The evidence will be either oral or documentary. Where the attendance of witnesses is required the party may procure it by suing out writs of "*subpœna ad testificandum*," copies of which must be served a reasonable time before the trial on the intended witnesses, their necessary expenses at the same time being tendered to them. If a witness neglect to attend, the plaintiff may proceed against him either by way of attachment, to punish his contempt of Court, or by way of action, to indemnify himself from the injury he has sustained in consequence of the witness's absence. The writ of *subpœna* may be issued to compel the attendance of a witness in any part of England, and by means of an order the attendance of a witness in Scotland or Ireland may be compelled.<sup>3</sup> If the witness be in prison on civil process, a writ of "*habeas corpus ad testificandum*" is the proper mode of obtaining his appearance; and if a prisoner on criminal process, one of her

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<sup>2</sup> C. L. P. Act, 1854, s. 58; Ord. lli. 3, p. 331.

<sup>3</sup> 17 & 18 Vict. c. 34.

Majesty's Principal Secretaries of State, or any judge of the High Court, may issue a warrant or order for that purpose.\*

As to documentary evidence if the instruments be in the party's own possession, he must be prepared to produce the originals, if in that of his adversary, he must give him a notice to produce them ; and in case they are not produced he will, on proof of the notice, be allowed to give secondary evidence of their contents, that is, a copy or a witness's recollection. The form of a notice to produce is given as Form 7 in the Appendix. If they be in the hands of a third person the attendance of that person with them must be enforced by a "*subpœna duces tecum*." The expense and difficulty of proving documents are considerably diminished by the rule which has of late years been introduced, and which is fully recognised by the Judicature Acts, compelling the opposite party to admit them, or if he refuse and they are afterwards proved, subjecting him to the costs of the proof, unless the refusal to admit be held reasonable at the trial.<sup>a</sup> Moreover, if no notice to admit be given, the party who might have given it will not be allowed the cost of proving the document unless the taxing-master think that it was in fact less expensive to prove the document than give the notice. The form of a notice to admit is given as Form 8 in the Appendix. If either party, on the trial of the action becoming imminent, be not

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\* 16 & 17 Vict. c. 30, s. 9.

<sup>a</sup> Ord. xxxli. 2, p. 301.

sufficiently prepared with his evidence, he may at the last moment, with the consent of his opponent, withdraw the action, usually on the terms of paying the costs of the day.<sup>b</sup>

All the preliminaries for the trial being disposed of, the action will be tried either at the Sittings in London or Middlesex or at the Assizes. During the Sittings, the duration of which has already been stated, Courts are held both in London and Middlesex for the trial of actions by as many judges as may be necessary or available. The Assizes are held for civil business in each county twice a year, and in some counties more often before persons appointed under the Queen's Commission, among whom are almost always two of the judges of the High Court for each circuit.

The trial takes place before one of the five tribunals already described, and the most convenient course will be first of all to describe the proceedings at a trial by jury, which is the most solemn of all the forms of trial, and afterwards to point out in what respect the others differ from it.

The action, when entered, will be placed in a list, and will eventually find its way into the list of a particular judge on a particular day, when it will be called on in due course in open Court. If the plaintiff thereupon appear, but the defendant is unrepresented, the plaintiff must prove his claim.<sup>c</sup> If, on the other hand, the plaintiff is absent, but the defendant appears, he is entitled to judgment dismissing the action, unless he has a

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<sup>b</sup> Ord. xxiii. 2, p. 289.

<sup>c</sup> Ord. xxxvi. 18, p. 309.

counter-claim, in which case he must prove it.<sup>d</sup> Judgment so obtained in default of appearance may, however, be set aside on terms on application within six days either at the Assizes or in Middlesex.<sup>e</sup> If such failure to appear is a mere accident, it is a matter of course to set aside the judgment on payment of the costs thrown away.<sup>f</sup> If, however, both parties appear, and no order has been made to put off the trial, or the plaintiff and defendant have not agreed to withdraw the record, the first step taken is to empanel and swear the jury. The jurors summoned, whose names are entered in the list or panel, are first called over; but to secure an impartial selection, this is not done in their order on the list, but by chance. The names of all the common jurymen, or all the special jurymen, as the case may require, are written on separate pieces of paper, which are placed in a box, and drawn out one by one by the associate. The first twelve drawn who answer to their names are, subject to challenges, the jury to try the case.<sup>g</sup> When the jury is a special jury, they have sometimes already gone through a preliminary process called nominating and reducing special jurors, which was formerly practised in choosing all special juries, and which may now be ordered to be used for the choice of special jurors at the sittings or assizes.<sup>h</sup> The pro-

<sup>d</sup> Ord. xxxvi. 19, p. 309.

<sup>e</sup> Ord. xxxvi. 20, p. 309.

<sup>f</sup> *Burgoine v. Taylor*, 47 L. J. Ch. 542; L. R. 9 Ch. D. 1.

<sup>g</sup> 6 Geo. IV. c. 50, s. 1 (common); 33 & 34 Vict. c. 77, s. 16 (special in London and Middlesex); C. L. P. Act, 1852, s. 108 (special at the assizes).



ceeding takes place before the under-sheriff or secondary in the presence of the parties or their solicitors, and is very like the practice in open Court, except that numbers corresponding to numbers on the panel are put into the box. Either party may object to the name of a special juror, and if he prove him incapacitated, his name is set aside, and so toties quoties until forty-eight be completed. These forty-eight are further reduced to twenty-four by each party striking off twelve, and the twenty-four are returned as the panel to try the case. These twenty-four go through the ordinary process of balloting already described to reduce them to twelve.<sup>b</sup>

As the jury are called over, they may, if either party object to them, or any of them, be challenged. Challenges are either to the "array" or to the "polls." Challenges to the array are exceptions to the entire panel, in consequence of some partiality imputed to the sheriff or other officer who arrayed it. Challenges to the polls are exceptions to particular jurors, and are of four kinds: first, "propter honoris respectum," as, if a lord of parliament were to be empanelled: secondly, "propter defectum," as, if one of the jurors be an infant, alien, idiot, or lunatic, or have not a sufficient estate; thirdly, "propter affectum," or for partiality, and this is either "principal," *i.e.*, carrying with it manifest ground of suspicion, or "to the favour." A challenge is principal when the

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<sup>b</sup> 6 Geo. IV. c. 50, s. 32.

juror is related within the ninth degree to either party, or has been arbitrator, or is interested in the cause, or has an action depending with one of the parties, or has taken money for his verdict, or formerly been a juror in the same cause, or is master, servant, counsellor, steward or solicitor to, or of the same society or corporation with, one of the parties; all these are principal causes of challenge, which, if true, cannot be overruled, for jurors must be "*omni exceptione majores*." A challenge to the favour is grounded only on some probable cause of suspicion, as acquaintance, or the like, the validity of which is determined by "triers." These, if the first juror be challenged, are two indifferent persons named by the Court; if they find one man indifferent, he is sworn, and he, with the two triers, tries the next, and when another is found indifferent and sworn, the two triers are superseded, and the two first sworn on the jury try the rest. Fourthly, "*propter delictum*;" this species of challenge may take place when the juror is tainted by some crime or misdemeanor which affects his credit.

The ceremony of drawing the jury must, if the parties require it, take place on the trial of each cause; but they almost always, by consent, allow the same set of twelve jurors to try several causes successively. If it should happen that, by reason of default or challenges, twelve of the jurors contained in the panel are not in attendance, there issues, if the trial be at Bar, a writ of "*undecim*," "*decem*," or "*octo*," "*tales*," according to the

number that is required to complete the jury. In other cases, the Court, at the request of the parties, may orally command the sheriff to name a sufficient number of men of the county, duly qualified, who, if the deficiency be of special jurors, are to be taken from the common jury panel. The jurors who have made default are, if they can offer no sufficient excuse, liable to be fined.

As soon as the jury has been sworn, the junior counsel for the plaintiff opens, that is, shortly states the pleadings, and the leading counsel on that side which has the right to begin proceeds to address the jury. This right to begin is frequently a matter of the very greatest importance, for it is an invariable rule that the counsel who begins has, if the opposite side calls witnesses, a right to reply: and it is well known from experience, that, in a doubtful case, the reply of an able advocate frequently determines the fate of the action. So important is this advantage that the parties will often, either on the pleadings or at the trial, admit facts which might fairly be disputed, with the view of securing the last word to the jury.

The question, which side is entitled to begin, is governed by the general maxim, "*Ei incumbit probatio qui dicit, non qui negat*;" for as it is very difficult, and sometimes impossible, to prove a negative, it is natural that the onus of proof should be upon the party asserting the affirmative, and this is, generally speaking, the rule of law. For instance, if, to an action on a promissory note, the defendant pleaded "that he did not make the

note," the affirmative being on the plaintiff, it would be for him to begin. But, if the defendant had pleaded "that he had paid the note," then the affirmative would be on him, and he would begin at the trial. However, though the above is the general rule, there are exceptions to it. And the judges have resolved, "that in cases of slander, libel, and other actions for personal injuries, where the plaintiff seeks to recover actual damages of an unascertained amount, he is entitled to begin, although the affirmative of the issue may in point of form be with the defendant." And this is the same in other cases, where the plaintiff seeks to recover unascertained damages. Thus, if to an action for improperly dismissing a solicitor's clerk, the defendant pleads that the plaintiff was guilty of misconduct in the service, the plaintiff is entitled to begin. But if, in an action for damages, the damages are ascertained, and the plaintiff has a *prima facie* case, on which he must recover that amount, and no more, unless the defendant proves what he has affirmed in his pleading, then the defendant begins. It may thus be laid down as a general rule that the party entitled to begin is he who would have a verdict against him if no evidence were given on either side. A new trial will not be granted because a judge has wrongly ruled at *nisi prius* as to which party was entitled to begin, unless such ruling did clear and manifest injustice.

The case having been opened, witnesses are called for the party beginning, and, in the event

of his opponent not announcing at the close of the evidence his intention to adduce evidence, the counsel for the party beginning sums up the evidence, and then the counsel for the opposite party addresses the jury. But if he adduces evidence, he, at the close of the case of the party beginning, opens his case, then adduces his evidence, and then sums up; the counsel of the party beginning having the right to the reply whenever any oral or documentary evidence is put in by his opponent.<sup>h</sup>

In the course of the case certain incidental proceedings may take place. The first to be noticed is an application to adjourn the trial, which may be granted, if deemed right for the purposes of justice, for such time and subject to such terms and conditions as may be thought fit.<sup>i</sup> A more frequent application is for an amendment of the record. It has been already explained, that if at the trial any discrepancy appeared between the material statement contained either in the plaintiff's or defendant's pleadings and the evidence adduced in support of them at the trial, this variance was formerly fatal, and the party in whose case it occurred failed in the action, although the merits might be undeniably with him. It has been likewise shown how, from time to time, the judge, on application by the counsel at the trial, has been empowered to amend variances of this sort, and, as this power is beneficial to the ends of justice, amendments are very liberally allowed.<sup>k</sup>

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<sup>h</sup> C. L. P Act 1854, s. 18.

<sup>i</sup> Ord. xxxvi. 21, p. 309.

<sup>k</sup> Ord xxvii. 1, 6, p. 290.

If the judge grant an amendment at the trial when he ought not, the party injured by it may move for a new trial. And it seems that in some cases a new trial may also be granted if the judge improperly refuse to make an amendment.

It frequently happens in the course of a trial that a party wishes to put in evidence a document which is required by law to be stamped, but which is insufficiently or not at all stamped, and there are important provisions to enable him to do so. All documents not properly stamped, except those which cannot by law be stamped after the execution thereof, upon payment of the duty and a penalty, may be read in evidence on the trial of a cause, upon payment to the officer of the Court who has to read the document at the trial, of the amount of duty and penalties payable for stamping such document. If the document has not a sufficient stamp, the deficiency only has to be paid with the penalties. No new trial can now be granted by reason of the judge having improperly ruled that the stamp upon any document is sufficient, or that the document does not require a stamp.<sup>1</sup>

Formerly a not uncommon incident of a trial by jury was the tendering of a bill of exceptions. It occurred when the counsel for either party was dissatisfied in point of law with the direction of the judge to the jury, or with his rejection or admission of evidence. A short note of the points was tendered to the judge, and afterwards reduced

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<sup>1</sup> C. L. P. Act, 1854 ss. 28, 29, and 31.

into the form of a special case, which, by virtue of the statute of Westminster the Second, the judge was bound to seal. Error was then brought on the judgment whereupon the bill of exceptions was considered by the Courts of Error. By the Judicature Act of 1875, bills of exceptions are expressly abolished,<sup>m</sup> but not so as to prevent either party insisting on the whole question being left to the jury with a proper direction, such right to be enforced by motion in the High Court of Justice or Court of Appeal, founded on an exception annexed to the proceedings.<sup>n</sup>

It sometimes happens that, instead of going on to verdict, the trial is suddenly put an end to in a mode not requiring the intervention of the jury. This may happen in four different ways: first, by the plaintiff's suffering a "nonsuit;" secondly, by the parties agreeing to "withdraw a juror;" thirdly, by the judge "discharging the jury" from finding any verdict; or fourthly, by a reference to arbitration.

With regard to a nonsuit, the word is derived from the Latin "non sequitur," or, more nearly, from the French "ne suit pas," because the plaintiff does not follow up his suit to its legitimate conclusion; for, in the ancient times, before the jury gave their verdict, the plaintiff was called upon to hear it, in order that, if it proved adverse to him, he might be held answerable for the fine which was in those days levied upon an unsuccessful

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<sup>m</sup> Ord. lviii. 1, p. 339.

<sup>n</sup> Jud. Act 1875, s. 22.

ful plaintiff. If he did not appear when thus called on he was nonsuited, that is, adjudged to have deserted his action, and the Court gave judgment against him for his default. And hence proceeds the ceremony which takes place even at this day, of calling the plaintiff to come into the Court when about to be nonsuited.

Another consequence of the ancient practice is, that a plaintiff cannot be nonsuited against his will; for a default is, in the nature of things, voluntary, and, when he is called on to appear, he may, if he thinks fit, make answer by his counsel; and, if he do, there can be no nonsuit; and although it is usual, and certainly highly proper, for the plaintiff's counsel to yield to the opinion of the judge, when the latter intimates that his case is not made out, and that he ought to suffer a nonsuit, still there have been instances in which the plaintiff's counsel have persisted in appearing, and have even gained a verdict by their pertinacity.<sup>o</sup> It is, however, obviously dangerous to the interests of a client to resist the judge when he is of opinion that there ought to be a nonsuit; for, if the plaintiff disregard the intimation, he is certain to direct the jury to find a verdict for the defendant. Formerly there was always this advantage in a nonsuit, that although the party nonsuited had to pay costs, he might afterwards bring a fresh action, while a verdict for the defendant was in general final. according to the present

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<sup>o</sup> See *Munchin v. Clement*, 1 B. & A. 252.



practice, a nonsuit is equivalent to a verdict on the merits, but the judge has power to order that it may have the same effect as before.<sup>p</sup> This power is generally exercised when there appears a probability of the plaintiff obtaining fresh evidence, and there is no reason to the contrary.

The "withdrawal of a juror" takes place when neither party feels sufficient confidence to render him anxious to persevere till verdict. In such case, they may, by consent, for it cannot be done otherwise, withdraw a juror, and as that leaves the jury incomplete, there can be no verdict, and the trial comes to an end. The withdrawal of a juror in this way always puts an end to the cause, and if the action be afterwards proceeded with, an application may be made to the Court or a judge to stay the proceedings.

It sometimes becomes necessary to discharge the jury, either on account of the sudden illness of a jurymen,<sup>q</sup> or because they cannot agree; in which case, when there is no hope of their resolving on a verdict, it is now the practice to discharge them, though the judge has power, still existing because never exercised, to carry them round the circuit, from town to town, in a cart.

As to a reference of the cause to the arbitration of a special or official referee, this happens when the issue involves some complicated questions of accounts or boundary, which it would not be easy to render intelligible to the jury, or where there

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<sup>p</sup> Ord. xli. 6, p. 319.

<sup>q</sup> *R. v. Edwards*, 3 Camp. 207.

are a number of conflicting claims, some perhaps legal and some equitable, all of which ought to be considered and decided before a final and satisfactory settlement of the whole litigation can be arrived at.

When the progress of the trial is not arrested by any of these occurrences, the evidence being heard and the counsel on both sides having addressed the Court the judge sums up the evidence to the jury, who then return their verdict. The verdict may be either general, that is, for the plaintiff or for the defendant, or special, that is, finding certain facts and leaving the Court to apply them.

The judge then usually directs the judgment to be entered according to the legal result of the verdict. He may, however, if he think fit, adjourn the case for further consideration. This happens when there is a doubt as to the effect on the result of the finding of the jury, or some question of the construction of a document is necessarily involved, and the judge desires to discuss that question more at leisure. The Rules, as amended in December, 1876, provide for the judge entering no judgment, but leaving either party to move for judgment before a divisional Court, but as this provision seems inconsistent with the Appellate Jurisdiction Act, 1876, which provides that all business arising out of an action shall be disposed of before a single judge, it is seldom brought into use.<sup>1</sup>

There is, however, a mode, still open to the

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<sup>1</sup> Ord. xxxvi. 22, p. 310.

parties, of obtaining the decision of a divisional Court on the law of the case. They may agree that the jury shall find a verdict subject to a special case, an expedient for obtaining the decision of the Court already referred to as open to the parties at any earlier stage of the action. They must now also agree that the special case be heard before a divisional Court.<sup>r</sup> In general, where it is intended that a verdict shall be so taken, evidence is given at the trial by each party to prove the facts upon which he relies, and if there is any disputed question of fact, it is determined by the jury. After the trial the case is drawn by the junior counsel for the plaintiff, and settled by the junior counsel for the defendant; and if any difference arise between them as to the form of the case, the judge who tried the cause will upon summons, and being attended by the junior counsel on both sides, settle the case from his notes. When the case is settled, it is argued like a demurrer, and the verdict is finally entered for which ever party the Court deems entitled to succeed. These special cases are not a very recent invention, for Mr. Justice Buller remarks, in 3 Tr. 131, that there is an instance of a special case having been granted as long ago as the reign of Charles the Second.

The direction of the judge for the entry of judgment is recorded by the associate in a book kept for the purpose. If the judge so direct, the findings of the jury will be recorded in the same

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<sup>r</sup> Ord. lviii. 1, p. 338, 339.

book, in which also any certificates granted by the judge are to be entered.

At this point in the trial the important question of costs arises. In very ancient times no costs were given in the Courts of Law, but by the Statute of Gloucester<sup>a</sup> and other early statutes the successful party in the Courts of Common Law in almost all actions invariably obtained his costs. In the Court of Chancery, on the other hand, the costs had always been in the discretion of the judge. The rule in the Supreme Court of Judicature follows that of the Court of Chancery, a general discretion being given to the judge subject to the right of such persons as mortgagees and trustees to have their costs out of a particular fund, and to a *prima facie* rule, the reason for which is by no means obvious, that where the case has been tried by a jury the successful party has his costs unless he is deprived of them by the judge at the trial or a Divisional Court for good cause shown.<sup>b</sup> There are also certain Acts of Parliament which further modify the general discretion of the judge, the most important of which are the County Court Acts, the material sections of which are expressly retained by the Judicature Acts, in respect of actions in which relief could be given in the County Court.<sup>c</sup> In order to discourage the prosecution of actions for small sums in the High Court it is provided that if the plaintiff in an action of contract recover no more than £20, or £10 in an

<sup>a</sup> 6 Edw. I. c. 1.

<sup>b</sup> Ord. lv. p. 336.

<sup>c</sup> Jud. Act, 1873, s. 67.

action of tort, he shall not recover his costs unless the judge certify that there was sufficient reason for bringing the action in the High Court.<sup>2</sup> There has been much discussion as to the boundary line between tort and contract under this section, and the Court of Appeal, reversing the judgment of the Common Pleas Division, have held in an action brought for the wrongful detention of a picture, in which the jury gave the plaintiff £10 only, that he was entitled to costs without a certificate.<sup>3</sup> In the same way in actions over which the Admiralty Court had jurisdiction, if the plaintiff in the High Court do not recover more than he might have recovered in a County Court, or if in an action of salvage the value of the property saved do not exceed £1000, the plaintiff cannot have his costs unless the action be brought under an order of the High Court or a County Court, or unless the judge certify that it was a proper Admiralty cause to be tried in the High Court.<sup>4</sup> But these provisions do not apply to the costs of a counter-claim, although maintained to the extent of £10 only, as the defendant did not select the tribunal.<sup>5</sup>

By other statutes, passed in order to discourage frivolous actions of tort, but not referred to in the Judicature Acts, further limitation was placed on the right of the successful party to his costs. In any action of trespass, or trespass on the case, if

<sup>2</sup> 30 & 31 Vict., c. 142, s. 5.

<sup>3</sup> *Bryant v. Herbert*, 47 L. J. C. P. 670; L. R. 3 C. P. D. 389.

<sup>4</sup> 31 & 32 Vict. c. 71, s. 9.

<sup>5</sup> *Blake v. Appleyard*, 47 L. J. Ex. 406; L. R. 5 C. P. D. 195.

the plaintiff recovered less than forty shillings damages, he was not entitled to recover costs unless the judge certified that the action was brought to try a right besides the mere right to damages.<sup>b</sup> In an action of slander, where the plaintiff recovered less than forty shillings, he was, with significant irony, allowed by a Statute of James I. to recover only as much costs as damages, and he lost even this small satisfaction unless the judge certified under the preceding statute.<sup>c</sup> It was for some time a moot question whether these last-named statutes were still in force since the Judicature Acts, but it is now settled by a decision of the House of Lords<sup>d</sup> that they are implicitly repealed. If, therefore, the action is one in which relief cannot be given in the County Court, so that the sections as to recovering a minimum which are expressly retained by the Judicature Acts do not apply, the successful party now obtains his costs, unless for good cause shown the judge certify to deprive him of them. What cases are excluded from the operation of the County Courts Acts by the words "in which relief can be given in the County Courts" is not quite clear, but the County Courts have at present no jurisdiction to try actions for breach of promise of marriage, malicious prosecution, slander, libel, or seduction.

The actual amount of costs is afterwards determined by the taxing master. The party entitled to costs gives notice to the opposite party, and the

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<sup>b</sup> 3 & 4 Vict. s. 24.

<sup>c</sup> 21 Jac. I. c. 16.

<sup>d</sup> *Garnet v. Bradley*, 48 L. J. Ex. 186, L. R. 3 App. Cas. 944.

propriety of his charges is determined according to the scale provided by an Order in Council made under the Judicature Acts. The taxation of the master may be reviewed by a judge or divisional Court.

Such being the procedure at a trial by jury, the proceedings where another mode of trial is adopted differ very little from it. The most important of the other modes of trial is the trial before a judge. This proceeds precisely as before a jury, so far as circumstances admit, but it often happens, especially in the Chancery Division, that at a trial before a judge the evidence has been taken by affidavit, and is not given orally, or the witnesses are only cross-examined. A trial before a referee is conducted in the same manner as a trial before a judge, and the referee has the same power as a judge, except that he cannot commit for contempt. A referee may submit any question to the Court, or state any facts specially for its opinion, and the case may be sent back to him, or the case decided by the Court on the evidence taken before him.\* He may hold the trial where he thinks most convenient, and adjourn it from one place to another and have any inspection or view which may be necessary. He must sit "de die in diem" unless otherwise directed.

Another form of trial, which is conducted in a similar way to the trial of the action, is a trial under a writ of inquiry. This writ issues upon interlocutory judgment being entered, that is, a judg-

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\* Ord. xxxvi. 34, p. 312.

ment that the plaintiff recover damages without naming the amount. Interlocutory judgment is entered where the defendant fails to appear, or fails to deliver his defence in an action for unliquidated damages. Formerly a writ of inquiry was the only mode of ascertaining the quantum of an interlocutory judgment, except in some few cases in which the master was allowed to compute them, but now the damages may, under an order, be ascertained by any of the five modes of trial in use in the High Court.<sup>f</sup> A writ of inquiry commands the sheriff to inquire what the damages are by a jury, and return the inquisition to the Court. The sheriff's deputy sits as judge, and sums up the evidence to the jury, and when he has returned his inquisition, final judgment is given that the plaintiff do recover the amount assessed. Final judgment is entered and execution issued at the expiration of four days from the return, unless the officer before whom the writ is executed certify that, in his opinion, judgment ought not to be entered till the defendant has had an opportunity to apply to the Court to set aside the assessment and grant a new writ.<sup>g</sup> Execution may also be stayed by an order, and even after entering judgment and issuing execution, judgment may be vacated, and the execution set aside for the purpose of granting a new writ of inquiry, if justice appear to require it.

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<sup>f</sup> Ord. xiii. 6, p. 268.

<sup>g</sup> 1 Will. IV. c. 7.



## CHAPTER VIII.

## MOTIONS AFTER TRIAL AND ENTRY OF JUDGMENT:

THE history of the great majority of actions ends with the trial, but cases of difficulty or importance have often to be discussed again afterwards. Sometimes this discussion is in the nature of an appeal from the judge, referee, or jury who tried the case, and takes place before a divisional Court composed of several judges, but sometimes it has been reserved by the judge at the trial for further argument before himself.

We have already seen that in some cases the judge abstains from ordering judgment to be entered at the trial, but adjourns the case. In this event the action comes on again upon further consideration.<sup>a</sup> No formal procedure is provided for this step in the cause, but the judge gives notice of the day when he will hear the case. Thereupon a formal argument takes place upon the question of law involved, the plaintiff usually beginning and having a right of reply, and the judge gives such judgment as the finding of the jury and the law of the case appear to warrant.<sup>a</sup>

Upon further consideration questions like those formerly raised on motions for judgment non

obstante veredicto and in arrest of judgment may now be raised.

A motion for judgment non obstante veredicto was one which was only made by a plaintiff. There is no instance to be found in the books of such a judgment having been awarded at the instance of the defendant. It was given when, upon an examination of the whole pleadings, it appeared to the Court that the defendant had admitted himself to be in the wrong, and had taken issue on some point, which, though decided in his favour by the jury, still did not at all better his case.

A motion "in arrest of judgment" was the exact reverse of that for judgment non obstante veredicto. The applicant in the one case insisted that the plaintiff was entitled to the judgment of the Court, although a verdict had been found against him. In the other case, that he was not entitled to the judgment of the Court, although a verdict had been delivered in his favour. Like the motion for judgment non obstante veredicto, that in arrest of judgment must always have been grounded upon something apparent on the face of the pleadings. Under the altered and less strict system of pleading now in use with its ample powers of amendment and the complete authority given to the judge at the trial, questions such as those raised by these motions are much less frequent if not altogether disused.

Further considerations also take place when inquiries, accounts, or issues have been ordered to be made, taken, or tried, and the matter comes

before the judge a second time to give effect to what has been done in the meanwhile. This form of further consideration is frequently used in the Chancery Division.<sup>b</sup>

If the unsuccessful party is dissatisfied with the verdict of the jury, his course is to move for a "new trial." This proceeding is most common in actions which take place in the Queen's Bench, Common Pleas and Exchequer Divisions of the High Court. The motion is not made on notice to the other side, but the party moving is required to make out a *prima facie* case for disturbing the verdict before the other side is called upon. He must apply to a divisional Court for a rule nisi if the trial took place in London or Westminster within four days from the trial or the first subsequent day on which a divisional Court is sitting. If the trial took place elsewhere the motion must be made within seven days after the last of the circuits during which the trial took place has ended, or within the first four days of the following sittings if the circuit ended in vacation or a week before vacation.<sup>c</sup> The rule calls upon the opposite party to show cause, at the expiration of eight days, or so soon as the case may be heard, why a new trial should not be directed on a specified ground or grounds. The case is then placed in the new trial paper, and is reached in due course. The counsel for the party served with the rule first shows cause; his opponent supports the rule, and judg-

<sup>b</sup> Ord. xl. 10, p. 318.

<sup>c</sup> Ord. xxxix. 1 a, p. 315.

ment, either discharging the rule or making it absolute, is then delivered by the judges.

A new trial may be obtained in the case of a trial before a judge without a jury, except that the judge's decision cannot be impeached as against the weight of evidence.<sup>d</sup> Where the trial is before a referee, his decision is subject to be set aside by the Court, but not formally on a motion for a new trial.<sup>e</sup> But motions for a new trial most usually take place when the action has been tried by a jury; and the whole law on the subject is formed with reference to this mode of trial.

The first reported case of a motion for a new trial is that of *Wood v. Gunston*, Styles, 462, which took place in the year 1665. In ancient times the mode of impeaching the verdict, if not warranted by the evidence, was most extraordinary. It was supposed that if twelve men gave an untrue verdict, they must have been actuated to do so by corrupt motives; and, therefore, the unsuccessful party was at liberty to sue out a writ called a writ of attain, which, at first, applied to real actions only, but was extended by a statute of Edward the Third<sup>f</sup> to all actions whatever. Under the authority of this writ of attain, a jury of twenty-four men was convened to try the validity of the first verdict; the same evidence only was allowed upon the second trial as had been given on the first; and if, upon the second trial, the

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<sup>d</sup> C. L. P. Act, 1854, s. 1.

<sup>e</sup> Jud. Act, 1873, s. 53.

<sup>f</sup> 34 Ed. III. c. 7.

jury of twenty-four returned a verdict contrary to that of the jury of twelve, not only was the first verdict set aside, but the Court pronounced upon the jury who gave it judgment, "that they should lose all civil rights and be perpetually infamous; that they should forfeit all their goods, and the profits of their lands; should be themselves imprisoned, their wives and children driven out of doors, their houses razed, and their lands wasted." Although this proceeding, as may be supposed, became obsolete as civilization progressed, yet there are instances of its having been resorted to in the reign of Elizabeth, and it was not formally abolished until the reign of George the Fourth.\*

When this barbarous process fell into disuse, the Courts finding it absolutely necessary that some mode should exist of rectifying the erroneous verdict of a jury, began to listen to the applications which have now become frequent for new trials, and they founded their power of doing so on the principle that if the jury gave a wrong verdict, that would not warrant them in pronouncing an iniquitous judgment; and, therefore, if there appeared reason to fear that such would be the consequence, they had a right to refer the cause to another examination. Accordingly, a motion for a new trial may now be made on any ground which raises a fair probability that the verdict at the first trial was erroneous.

The most important of the grounds on which

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\* 6 Geo. IV. c. 50, s. 60.

an application for a new trial is based are, that the judge who tried the cause misdirected the jury in point of law, or admitted evidence which ought to have been refused, or rejected evidence which ought to have been admitted; for, in such cases, as the jury have been misinformed of the true point they were convened to try, or have been deprived of proper, or furnished with improper, materials to build their conclusions on, it cannot be expected that they should have returned a proper verdict.

Applications for a new trial for misdirection raise questions in every branch of substantive law, and the admission or rejection of evidence involves the whole subject of the law of evidence. It was formerly held that, as it was impossible to estimate the precise effect which an additional fact, however trivial, may produce upon the minds of others, there ought, if the evidence improperly rejected could have had any effect whatever on the jury, to be a new trial. In the same way, where there was a misdirection on a point immediately in issue, a new trial was a matter of right. Now, however, a new trial will not be granted either for misdirection or the improper admission or rejection of evidence, unless some substantial wrong has been produced by it.<sup>h</sup>

The Court will sometimes grant a new trial because the defendant received no due notice of trial. A new trial may also be granted on account

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<sup>h</sup> Ord. xxxix. 3, p. 315.

of the misbehaviour of the successful party. In a reported case, handbills, reflecting on the plaintiff's character, had been distributed about the Court, and even shown to the jury.<sup>1</sup> So if any of the jury have misbehaved, as by casting lots to determine the verdict, it is a ground for a new trial.<sup>k</sup> But the Court will never permit jurors to make affidavits disclosing their own misbehaviour, although affidavits of jurors as to what took place in open Court on the delivery of the verdict are receivable, or it seems, to defend themselves from a charge of personal misconduct.<sup>l</sup>

Another ground on which a new trial is sometimes allowed is that of excessive damages. In actions, indeed, for personal torts, such as slander, or malicious prosecution, and especially in actions for criminal conversation or seduction, the Courts are extremely averse to grant a new trial on this ground, unless the damages given are perfectly outrageous.<sup>m</sup> New trials have been granted also when the verdict has been obtained by surprise, or the witnesses for the prevailing party are manifestly shown to have committed perjury. In short, whenever it can be made out to the satisfaction of the Court that justice and fairness require that a new trial should be had, there the application may be made, and it is in the power of the Court to accede to it.

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<sup>1</sup> *Coster v. Merest*, 3 B. & B. 272.

<sup>k</sup> *Ramadge v. Ryan*, 9 Bing. 333.

<sup>l</sup> See *Vaise v. Delaval*, 1 T.R. 11.

<sup>m</sup> See *Price v. Severne*, 7 Bing. 316; *Chilvers v. Greaves*, 5 M. & G. 578; *Creed v. Fisher*, 9 Ex. 472.

One of the commonest grounds on which new trials are applied for is, that the verdict has been either against the weight of the evidence, or without any evidence at all. Where there was no evidence at all to warrant the conclusion come to by the jury, the Court will always grant a new trial. But where there was some evidence upon the winning side, they interfere, if at all, with great reluctance, considering that where there is conflicting testimony, it is the province of the jury not the Court to strike the balance. Still, if the judge who tried the cause express dissatisfaction with the verdict, it is usual, out of respect for his opinion, to submit the case to the investigation of another jury. It is also a general, though not inflexible rule, that a new trial will not be granted on this ground, unless the judge does declare himself dissatisfied with the verdict. But to prevent litigious persons from forcing others into expenses wholly disproportionate to the real importance of the controversy, the Courts have established a rule that they will not grant a new trial on the ground of the verdict being against the weight of the evidence, where the damages or matter in dispute was less than twenty pounds, and no permanent right in question.<sup>n</sup> This rule is sometimes, but very seldom, departed from. In a case in the Exchequer, where the verdict was for a sum not exceeding twenty pounds, a new trial was granted, the judge expressing himself dissatisfied with the verdict,

<sup>n</sup> *Bryan v. Philip*, 1 Cr. & Mee 26; *Williams v. Evans*, 2 M. & W. 220.



and there being an uncontradicted affidavit, that before the defendant's case had been heard, one of the jurymen had said, "The parson," meaning the defendant, "will get served out."° This rule is not applicable to cases where the new trial is moved for on the ground that the learned judge, who tried the cause misdirected the jury, or received improper or excluded proper evidence; because it is looked upon as of importance to the public that the erroneous exposition of the law, emanating from so high a source, should be corrected, and not allowed to ripen into a precedent.

A motion for a trial "de novo," formerly called a "venire de novo," is a proceeding very similar to that for a new trial, and its effect, if granted, is identical; for when a trial de novo is awarded, another trial of the cause is had, as if a rule for a new trial had been made absolute; and indeed the old name of the proceeding itself so signifies, for the words venire de novo meant no more than that a new venire or jury process is to be directed to the sheriff. Still there are several distinctions between a motion for a trial de novo and for a new trial. The new trial is grantable for any reason which renders it right, fit, and just that the first verdict should undergo revision. It is otherwise with the award of a trial de novo, which is a proceeding far more ancient than the motion for a new trial. In cases where it is grantable, the Court is bound to grant it, and can exercise no

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° *Alum v. Boulbee*, 23 L. J. Ex. 208.

discretion on the subject. Those cases are comparatively few in number, and the grounds for awarding it are not, as in many of the instances in which a new trial is granted, of an equitable description, but are of a more technical sort, such as the wrongful disallowance of a challenge, or some defect in the finding of the verdict, which renders it uncertain and ambiguous. Nor can the Court, as can sometimes be done in the case of a new trial, impose any condition on the party claiming the trial *de novo*.<sup>p</sup>

The Courts have power to grant successive new trials of the same action, and they will do so where the justice of the case obviously requires it, though it is a power which they are in the habit of exercising sparingly and with reluctance.<sup>q</sup>

The trial having taken place, and any motions subsequent to the trial having been made, the next step is the entry of judgment. This is done by the officer in charge of the Judgment Book, to whom must be delivered a copy of the pleadings in the action,<sup>r</sup> and, if the judgment was ordered to be entered at the trial, the Associate's certificate, or the order made, if the judgment were given on motion, or any other necessary document, verified, where required, by affidavit in regular form.<sup>s</sup> The date of the judgment is the day on which it was delivered when pronounced in Court,<sup>t</sup> and the day

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<sup>p</sup> See *Witham v. Lewis*, 1 Wils. 48, and *Edwards v. Brown*, 1 Tyrw. 281.

<sup>q</sup> *Fox v. Clifton*, 9 Bing. 115.

<sup>r</sup> Ord. xli. 4, 5, p. 319.

<sup>s</sup> Ord. xli. 1, p. 318.

<sup>t</sup> Ord. xli. 2, p. 319.

on which the requisite documents are left with the officer in other cases.<sup>a</sup> Forms of judgment are given as Forms 10, 14, and 19 in the Appendix.

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<sup>a</sup> Ord. xli. 3, p. 319.

## CHAPTER IX.

## SUMMARY PROCEEDINGS.

HITHERTO we have been following the progress of an action in its ordinary course through the pleadings and trial to judgment, but it often happens that the due sequence of proceedings is interrupted, and judgment obtained, or the action otherwise disposed of, without the regular procedure being gone through. The commonest of these summary proceedings is obtaining judgment by default.

Judgment by default is obtained when one party neglects to take a step in the action which he is bound to take according to the rules of procedure. This frequently happens at the very first step, and judgment is entered in default of appearance. If the defendant does not enter an appearance in the prescribed manner within the eight days named in the writ, the plaintiff may enter judgment against him. In the same way judgment may be entered by the plaintiff in default of the statement of defence due from the defendant.<sup>a</sup> Conversely, if the plaintiff do

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<sup>a</sup> Ord. xxix. p. 293.

not deliver a statement of claim within the six weeks allowed, the defendant may apply to have the action dismissed with costs for want of prosecution.<sup>b</sup>

Judgment by default is either final or interlocutory, according to the nature of the action. It is final when the plaintiff's claim is for a debt or liquidated demand only.<sup>c</sup> If there be a claim for damages or detention of goods, the judgment is interlocutory, and a writ of inquiry generally issues to assess the damages or the value of the goods, or the assessment may be made under an order by any of the modes of trial in use in the Court.<sup>d</sup> In an action for the possession of land, judgment by default is to the effect that the plaintiff recover possession of the land,<sup>e</sup> and if there be a claim for mesne profits, arrears of rent, or damages for breach of covenant, final judgment may be entered for the land, and interlocutory judgment for the rest of the claim.<sup>f</sup> Similarly, final judgment may be entered for want of a defence in respect of a liquidated demand, and interlocutory judgment in respect of damages, where both claims have been joined in one action.<sup>g</sup> The effect of default in Probate actions, and actions assigned by the Judicature Acts to the Chancery Division, and all other

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<sup>b</sup> Ord. xxix. 1, p. 293.

<sup>c</sup> Ord. xlii. 3 (appearance), p. 267; Ord. xxix. 2 (defence), p. 294.

<sup>d</sup> Ord. xlii. 6 (appearance), p. 268; Ord. xxix. 4 (defence), p. 294.

<sup>e</sup> Ord. xlii. 7 (appearance), p. 269; Ord. xxix. 7 (defence), p. 295.

<sup>f</sup> Ord. xlii. 8 (appearance), p. 269; Ord. xxix. 8 (defence), p. 295.

<sup>g</sup> Ord. xxix. 6, p. 294.

actions not expressly mentioned, is not to allow judgment by default, but to allow the action to proceed notwithstanding, and to be entered on motion for judgment.<sup>b</sup> Where an account is claimed by endorsement on the writ, and default of appearance is made, an order for an account may be made immediately, based on an affidavit proving service of the writ, and stating the grounds of the claim.<sup>1</sup>

On entering judgment by default of appearance, an affidavit of the service of the writ must be filed.<sup>2</sup>

Where the writ is specially endorsed, final judgment by default of appearance may be at once entered for the amount claimed, with interest and costs.<sup>1</sup> Where the writ is not specially endorsed but the action is for a liquidated demand, an affidavit stating the particulars of the claim must be filed, as well as the affidavit of service, when judgment for the amount claimed and costs may be entered in eight days.<sup>m</sup>

Where default is made in any pleading subsequent to the statement of defence, as if the plaintiff do not deliver a reply or demurrer, or any party do not duly deliver any subsequent pleading, the pleadings are taken to be closed, and the statements of fact in the last pleading admitted.<sup>n</sup> After the close of the pleadings a summary remedy is given to the defendant by way of motion to dismiss

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<sup>b</sup> Ord. xiii. 9 (appearance), p. 269 ; Ord. xxix. 9, 10 (defence), p. 295.

<sup>1</sup> Ord. xv., p. 271.

<sup>2</sup> Ord. xiii. 2, p. 267.

Ord. xiii. 3, p. 267.

<sup>m</sup> Ord. xiii. 5, p. 268.

<sup>n</sup> Ord. xxix. 12, p. 295.

the action for want of prosecution if he prefers that course to giving notice of trial. For instance, if the plaintiff does not reply within the prescribed three weeks, the pleadings are closed, and the allegations of fact in the statement of defence are taken to be admitted. Thereupon, if the plaintiff does not within six weeks give notice of trial, two courses are open to the defendant. He may either give notice of trial himself,<sup>o</sup> or may move to have the action dismissed for want of prosecution.<sup>p</sup> If he succeed in the latter course, the dismissal of the action is no bar to a second, and both courses are subject to be met by the plaintiff applying for leave to deliver his reply.

Sometimes default is made by some defendants but not by others. In this case, formerly, the plaintiff in an action of contract could not issue execution against the defaulters until he had recovered judgment against the others, because if a verdict were eventually returned in favour of any defendant, it was held to accrue to the benefit of all. Now, however, the plaintiff may issue execution against the defaulters at once, and proceed with his action against the others if he think fit.<sup>q</sup> Where default is made by some out of several defendants, in any action for damages, interlocutory judgment may be signed against the defaulters, and the damages will be assessed at the time of the trial of the action, unless otherwise ordered.<sup>r</sup>

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<sup>o</sup> Ord. xxxvi. 4, p. 307.

<sup>p</sup> Ord. xxxvi. 4 a, p. 307.

<sup>q</sup> Ord. xlii. 4, p. 268.

<sup>r</sup> Ord. xxix. 5, p. 294.

Sometimes judgment is allowed to pass by default by arrangement between the parties. This happens when the defendant has no defence to the action, and agrees to the plaintiff entering judgment against him on the terms of his giving time for the payment of the debt and costs. Such arrangement can be carried out by the defendant executing a "warrant of attorney" or a "cognovit actionem," or by consenting to a judge's order being drawn up, authorizing the plaintiff to sign judgment. These methods of proceeding are subject to many abuses, and have been regulated by statute from time to time for the protection of the debtor. The warrant of attorney or cognovit must be witnessed by a solicitor, who must be present on behalf of the person giving it, to inform him of the nature and effect of the warrant or cognovit. This is necessary, although the person executing the warrant of attorney or cognovit in fact understands the nature and effect of it.<sup>a</sup> The warrant of attorney or cognovit, or a true copy, must be filed with an officer of the Court within twenty-one days after its execution, otherwise it will be deemed fraudulent and void; and if the warrant of attorney or cognovit was given subject to any defeasance or condition, such defeasance or condition must appear. In actions where the defendant has appeared by solicitor the consent to the judge's order authorizing the plaintiff to sign judgment must be given by the

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<sup>a</sup> 32 & 33 Vict. c. 62; Debtor's Act, 1869, ss. 24, 25.



defendant's solicitor or agent, and where the defendant has not appeared, or has appeared in person, the order cannot be made unless the defendant attends the judge and gives his consent in person, or unless his written consent be attested by a solicitor acting on his behalf; except in the case where the defendant is a barrister, conveyancer, special pleader, or solicitor.<sup>t</sup> The judge's order should be filed in the same way as a warrant of attorney or cognovit.

Where a judge's order authorizing the entry of judgment or the issuing of execution is made by consent, whether subject to any defeasance or condition or not, the order must, together with an affidavit of the time of consent being given, and a description of the residence and occupation of the defendant, be filed with an officer of the Court within twenty-one days after the making of the order, otherwise the order and any judgment and execution signed and issued thereon are void.

A judgment by default is always liable to be set aside by an order on such terms as to costs or otherwise as may be thought fit. This is done in the exercise of what in the Courts of Common Law was called their equitable jurisdiction. In a proper case the Court will always interfere to prevent its rules and its authority, created as they are for the advancement of justice, from being

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<sup>t</sup> R. 156, 157, H. T., 1853.

perverted and abused, so as to produce injustice and oppression. It is plain that the administration of the laws would be in danger of falling into disrepute, were it not for this salutary exercise of jurisdiction. If a designing person by false representations induce an ignorant man to sign a cognovit, or execute a warrant of attorney, the Court will relieve him. So, if a judgment be signed contrary to good faith, it will be set aside. Again, where a defendant, through some accident, has not entered an appearance or delivered his defence within the proper time, and judgment by default is signed against him, this, though illiberal, when done so hastily as to amount to what is called "snapping a judgment," is nevertheless regular, because the rules of the Court give the plaintiff a right to do it. However, as it would be an extremely hard thing if the defendant were to be shut out of a good defence by a slight mistake made perhaps by his solicitor, the Court, to prevent this hardship, will set aside the judgment upon proper terms. It is a general rule that whenever the suitor can point out some great hardship likely to arise from a strict observance of the rules by which the practice of the Court is governed, he may apply for relief, which, ordinarily, will be granted; unless, indeed, he be wilfully late in making his application, or unless the grant of relief to him would impose hardship on the opposite party. But this relief is granted as a favour, not as a right, and the Court will, in bestowing it, impose any terms it thinks proper. Thus, it almost invariably im-

poses the payment of any costs which the other party may have incurred, and frequently, as, for instance, in the case of setting aside a regular judgment, insists upon an affidavit of merits. It would obviously be ridiculous to relieve a defendant from a judgment when he has no meritorious defence to the action, but is only anxious to postpone the payment of a fair debt and set up vexatious objections to a just demand.

Next to judgment by default the most important summary remedy is that provided by the Summary Procedure on Bills of Exchange Act.<sup>a</sup> It was justly thought that a defendant who was alleged so far to have acknowledged the debt as to have signed a bill of exchange or promissory note, ought not to be allowed to put his creditor to the delay and expense of the regular steps in an action, unless he could show a reasonable ground for defending the claim immediately on the issue of the writ. It was accordingly provided by this Act, that actions on bills of exchange or promissory notes, brought within six months after they have become due, may be commenced by a peculiar writ of summons. The plaintiff, on filing an affidavit to the effect that this writ had been personally served within the jurisdiction of the Court, or an order for leave to proceed as if personal service had been effected, and a copy of the writ of summons and the indorsements upon it, may sign judgment and issue execution. A defendant, however, upon paying into Court the sum in-

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<sup>a</sup> 18 & 19 Vict. c. 67.

dorsed on the writ, or by showing on affidavit a defence to the action upon the merits, or such facts as would make it incumbent on the holder of the bill or note to prove consideration, or such other facts as the judge may deem sufficient, may, within twelve days from the service of the writ, obtain leave from a judge to appear to it, and defend the action. The defendant will be allowed to appear and defend where there is any defence suggested, either in law or in fact, which there is any reasonable ground for supposing may be supported. No other claim than a claim on a bill of exchange or promissory note can be included in writs issued under this Act. If, however, leave be given to defend, the action falls into its place as an ordinary action.

Somewhat similar to the summary procedure on a bill of exchange is the application for speedy judgment allowed by the Judicature Act of 1875 in all actions of contract where the writ has been specially endorsed. If the defendant appear, the plaintiff may make an affidavit affirming his own cause of action, and negating, according to the best of his belief, that the defendant has any ground of defence, or may procure an affidavit to the same effect from some one acquainted with the facts, and may thereupon call on the defendant by summons, which must be accompanied by a copy of the affidavit, to show cause why final judgment should not be entered for the amount endorsed with interest and costs.<sup>1</sup> This summons

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<sup>1</sup> Ord. xiv. 1, p. 270.

is returnable not less than two clear days after service.<sup>u</sup> The order will be made unless the defendant, by producing affidavits, or by some other means, satisfy the judge that he has a good defence on the merits, or disclose sufficient facts to entitle him to be allowed to defend.<sup>v</sup> The defendant may be ordered to attend and be examined on oath, and compelled to produce books or documents. If he make an affidavit, he must say whether the defence alleged goes to the whole or a part of the claim, and an order may be made for immediate judgment as to part.<sup>v</sup> If there are several defendants, some may be allowed to defend and others have judgment entered against them at once,<sup>w</sup> and in any case the defence may be allowed upon such terms as may appear proper. If the defendant undertake to bring the money into Court, he will generally have leave to defend.<sup>a</sup>

Another very common form of summary proceeding is "interpleader." Sometimes an action is brought against a person in respect of money or property to which he himself has no claim, but which is claimed by some one besides the plaintiff. It is obviously unjust that the defendant should under these circumstances be put to the expense of defending an action in which he has no real interest, while, on the other hand, if he let judgment go by default, he may expose himself to an

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<sup>u</sup> Ord. xiv. 2, p. 270.

<sup>v</sup> Ord. xiv. 3, p. 270.

<sup>v</sup> Ord. xiv. 4, p. 270.

<sup>w</sup> Ord. xiv. 5, p. 270.

<sup>a</sup> Ord. xiv. 6, p. 270.

action at the suit of the other claimant. His only way out of this dilemma was formerly by bill in equity, but the proceeding by interpleader, by means of which the action is summarily stopped against the defendant, and the two adverse claimants made to decide the matter between them, was given by various statutes, which are now fully applied to the High Court.<sup>b</sup>

The system created by those Acts is shortly this :—When an action of assumpsit, debt, detinue, or trover is brought against any person, for money or goods in which he claims no interest, but for which he expects somebody else will sue him, he may, after statement of claim, and before defence, apply to a judge at chambers, who will order both the claimants to appear.<sup>c</sup> If either of them fail to appear his claim is pronounced to be barred, but if they both appear, and if there really be a question between them, an issue, which raises the fact in dispute, is in general directed to be tried.<sup>d</sup> The party succeeding on the trial of such issue is then declared by the order to be entitled to the property in dispute. The costs of the proceedings are in the discretion of the judge.

It is not necessary for a person upon whom conflicting claims are made to wait until an action is brought. In the execution of their office, sheriffs are often put between two fires, and one branch of the statute applies to them

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<sup>b</sup> Ord. i. 2.

<sup>c</sup> 1 & 2 Will. IV. c. 58, s. 1.

<sup>d</sup> Ibid., s. 3.

alone. It often happens, especially in cases of bankruptcy, that a sheriff seizes goods under an execution against A., and then finds that B. lays claim to them, and threatens him with an action. In such cases, the Interpleader Act\* gives the sheriff a right to make an application, by means of which he will obtain the same protection that is afforded to private persons, under the former branch of the Act.

The Common Law Procedure Act, 1860, made some important alterations in the law relating to interpleader proceedings. By this Act interpleader may be granted though the titles of the claimants have not a common origin, but are adverse to, and independent of, one another.<sup>f</sup> The sale of goods seized in execution may be directed when they are claimed by a third party under a bill of sale or otherwise by way of security for a debt;<sup>g</sup> and in trifling cases, at the request of either party, the judge may decide the matters in dispute in a summary way;<sup>h</sup> or, if the question be rather of law than of fact, a special case may be stated for the opinion of the Court.<sup>i</sup>

There are also certain cases in which summary jurisdiction is given by a particular statute. These were passed before the union of law and equity in one Court, and mostly had for their object the recognition by courts of law of certain well-estab-

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\* 1 & 2 Will. IV. c. 58, s. 6; 1 & 2 Vict. c. 45, s. 2.

<sup>f</sup> 23 & 24 Vict. c. 126, s. 12.

<sup>g</sup> Ibid., s. 13.

<sup>h</sup> Ibid., s. 14.

<sup>i</sup> Ibid., ss. 15, 16.

lished principles of equity. Thus, by a statute of George the Second, and the Common Law Procedure Act, 1852, a defendant in an action of covenant or ejectment brought by a mortgagee against his mortgagor may, on paying principal, interest, and costs, or bringing them into court, summarily compel the mortgagee to reconvey the mortgaged lands and deliver up the title deeds.<sup>1</sup> Similarly, by the Common Law Procedure Act, 1860,<sup>m</sup> relief in a summary manner may be given in an action of ejectment brought upon a forfeiture for non-payment of rent, or for not insuring according to the terms of the lease.

A most extensive summary jurisdiction over replevin bonds and other bonds given by way of security under the County Court Acts is also possessed by the Court.<sup>n</sup> It is also invested with a very complete and summary power over the fees of sheriffs and their officers, who are prohibited from receiving any fees other than those allowed by the taxing officer of the Court under the sanction of the judges. If the sheriffs or officers take more, they may be punished summarily, upon application made to the Court before the end of the next Term, and may be ordered to pay the complainant's costs.<sup>o</sup> Applications for the purpose of invoking the summary jurisdiction conferred by

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<sup>1</sup> 7 & 8 Geo. II. c. 20 ; 15 & 16 Vict. c. 76, s. 219.

<sup>m</sup> 23 & 24 Vict. c. 126, ss. 1, 2.

<sup>n</sup> 19 & 20 Vict. c. 108, s. 70.

<sup>o</sup> 1 Vict. c. 55.



statute on the Court are made at Chambers in the first instance.

The ordinary course of the action may sometimes be terminated by the parties agreeing to the statement of a special case. This occurs when there is no dispute as to the facts, but the opinion of the Court is desired on the law applicable to them, or the inferences to be drawn from the facts.<sup>p</sup> The case is in the form of a narrative, and may be stated at any time after writ. After it is printed and signed by the parties or their solicitors, and filed,<sup>q</sup> it is entered for argument by delivering to the officer a memorandum for that purpose.<sup>r</sup> If a married woman or infant, or person of unsound mind, be a plaintiff to the action, leave is required for the statement of a special case, and an affidavit must be made verifying the facts stated in the case which affect the person under disability.<sup>s</sup>

Finally the parties may by agreement between themselves put an end to the action by entering a "stet processus." This is done with leave of the Court, and its effect is to stay all proceedings, each side paying its own costs.

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<sup>p</sup> Ord. xxxiv. 1, p. 302.

<sup>q</sup> Ord. xxxiv. 3, p. 302.

<sup>r</sup> Ord. xxxiv. 5, p. 303.

<sup>s</sup> Ord. xxxiv. 4, p. 302.

## CHAPTER X.

## EXECUTION.

EXECUTION is the process by which the judgment of the Court is enforced. It is effected by a writ of execution, which is a document directed to the sheriff or other proper person by the Sovereign, commanding him to take certain compulsory proceedings for the purpose of carrying the judgment into effect.

The most ordinary form of judgment is that by which one party is ordered to pay a sum of money to another party, and the usual mode of enforcing this judgment is by writ of "*fieri facias*," or "*fi. fa.*" This writ is a command to the sheriff that, of the goods and chattels of the party, he cause to be made the sum recovered by the judgment, together with interest at the rate of 4 per cent., and that he have the money and interest to be paid to the party who sued it out, and the writ itself before the Court immediately after the execution of the writ.<sup>a</sup> If the sheriff make a return to the writ that he holds the goods for want of buyers, the auxiliary writ of "*venditioni exponas*" commanding him to sell may issue. If after

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<sup>a</sup> Form 1, Appendix (F), Jud. Act, 1875.

making a return to this effect the sheriff go out of office, a writ of "*distringas nuper vice comitem*" may issue commanding the present sheriff to distrain his predecessor to sell the goods. If the sheriff return to a writ of *fi. fa.* that the debtor is a clergyman without lay goods, a writ of "*fieri facias de bonis ecclesiasticis*" may issue to the Bishop, or, in case of a vacancy in the bishopric, to the Archbishop, to levy the debt from the tithes or other profits of the benefice of the clergyman,<sup>b</sup> or a writ of "*sequestrari facias*" may issue to the same authority to take the benefice into his own hands until the debt be levied out of its profits.<sup>c</sup>

Formerly one of the most important processes for enforcing a judgment to pay money was a "*capias ad satisfaciendum*," or "*ca. sa.*" This writ commands the sheriff to take the debtor and keep him safely, so that he may have him in Court immediately after the execution of the writ, to satisfy the execution creditor to the amount of the debt and interest. Since the Act for the abolition of imprisonment for debt this writ can ordinarily only be employed in penal actions or where a solicitor is ordered to pay costs for misconduct, and even in these cases the debtor can only be detained for a year. It may be issued in extraordinary cases by order of a judge, for the committal of the debtor for a term not exceeding six weeks, on proof that he has or has had since

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<sup>b</sup> Form 4, Appendix (*F*), Jud. Act, 1875.

<sup>c</sup> Form 6, Appendix (*F*), Jud. Act, 1875.

the judgment the means to pay the debt. Personal service of the summons is required, unless it be shown that it has come to the debtor's knowledge, or that he wilfully evades service.<sup>d</sup> On tender of the sum due the execution creditor is bound to sign an authority to the sheriff for the debtor's discharge, or his discharge may be effected upon the written order of the solicitor by whom the *ca. sa.* was issued. If the debtor escape, the creditor has an action for negligence against the sheriff or gaoler. The writ of *ca. sa.* is now of such diminished importance that no more need be said about it.

Where the debtor has lands a writ of "*elegit*" may issue to enforce a judgment for the payment of money. This writ was first given by the Statute of Westminster the Second,<sup>e</sup> which enacted, that where a debt is recovered in the King's Court, or damages awarded, it shall be in the election (and hence the word *elegit*) of the suitor to have a writ of *fieri facias*, or that the sheriff deliver to him all the chattels of the debtor, saving his oxen and beasts of the plough, and a moiety of his land, until the debt be levied by a reasonable price or extent.<sup>f</sup> The writ now applies to the whole instead of half the real estate of the debtor.<sup>g</sup> The writs of "*levari facias*" and "*extent*" are similar writs, but the former is now almost entirely

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<sup>d</sup> 32 & 33 Vict. c. 62 ; Rules, Mich. T., 1869.

<sup>e</sup> 13 Edw. I. c. 18.

<sup>f</sup> Form 2, Appendix (*F*), Jud. Act, 1875.

<sup>g</sup> 1 & 2 Vict. c. 110, s. 11.

abandoned in favour of the writ of *elegit*, and the latter can only be issued on behalf of the Crown.

Where the judgment is for the possession of land or the delivery of specific chattels writs issue which command the actual execution of the judgment. The writ of "*habere facias possessionem*" commands the sheriff to enter the land recovered, and give possession of it to the person entitled under the judgment.<sup>h</sup> Before issuing this writ an affidavit must be filed showing service of the judgment and that it has not been obeyed.<sup>i</sup> In the same way the "writ of delivery" issued by virtue of an order commands the sheriff to cause the chattels mentioned in the writ to be returned to the person recovering them in the judgment, and if the chattels cannot be found to distrain the person responsible by all his lands and goods until the chattels be rendered.<sup>k</sup> A variation of this writ may also be issued which commands the sheriff, if the chattels cannot be found, to cause their value to be made out of the goods of the person responsible.<sup>l</sup>

Where the judgment directs the performance of any specific act other than the payment of money, such as the removal of a nuisance or the production of an account, it may be enforced either by proceedings against the person or the goods of the party involved.

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<sup>h</sup> Form 7, Appendix (*F*), Jud. Act, 1875.

<sup>i</sup> Ord. xlviii. 2, p. 327.

<sup>k</sup> Form 8, Appendix (*F*), Jud. Act, 1875.

<sup>l</sup> Ord. xlix., p. 328; C. L. P. Act, 1854, s. 78.

As a disobedience to a judgment to do a specific act is of a wilful character it is looked upon as a contempt of Court, and is punished by the most stringent processes. The High Court of Justice has borrowed from the Court of Chancery the writs of "attachment" and "sequestration," just as it has borrowed from the Common Law Courts the writs already described. A writ of attachment commands the sheriff to attach the person, and to have him before the Court to answer his contempt.<sup>m</sup> The leave of a judge must be obtained before issuing a writ of attachment after notice to the party proposed to be attached.<sup>n</sup> Instead of resorting to the writ a motion may be made, after personal service of notice, that the person in contempt be committed. The person attached in general remains in prison until he has purged his contempt by doing the act required. A writ of sequestration issues to Commissioners, generally four in number, by which authority is given to enter the lands of the person in contempt and sequester and receive into their hands his rents, goods, and chattels, and detain them until the contempt be cleared.<sup>o</sup> A writ of sequestration issues for non-payment of money into Court according to an order, and a judgment for the delivery of a specific chattel may be enforced by attachment and sequestration as well as by the writ of delivery already described.<sup>p</sup> The proceeds

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<sup>m</sup> Form 9, Appendix (*F*), Jud. Act, 1875.

<sup>n</sup> Ord. xliv. 2, p. 324.

<sup>o</sup> Form 10, Appendix (*F*), Jud. Act, 1875.

<sup>p</sup> Ord. xlii. 4, p. 320.

of sequestration may be dealt with as the Court directs.

Such being a brief description of the writs of execution available to the successful suitor, the mode of issuing and preparing these writs, and carrying them into effect, must next be considered.

Some considerations preliminary to the issuing of execution first require mention. If six years have elapsed since the judgment, the party desiring to issue execution must revive it by obtaining an order for the purpose. Upon such an application an issue may be directed to be tried for the purpose of ascertaining the rights of the parties.<sup>q</sup> If the judgment be for payment of money within a specified period, of course that period must first elapse, and if execution be stayed by an order, that time must have expired. If the relief is subject to any contingency, a demand for the performance of the judgment must first be made on the opposite party upon the fulfilment of the contingency, and an order for leave to issue execution may, under the rules of procedure, then be obtained.<sup>r</sup> This provision of the Judicature Acts substitutes a much simpler process for the *scire facias* formerly in use, which was in the nature of a new action, and applied to the case of judgment against an executor of "*assets quando acciderint*," and it was believed that fresh assets had come to his hands, or to the case of a judgment on the penalty of a bond payable by instalments, and it was desired to enforce payment of an instalment

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<sup>q</sup> Ord. xlii. 19, p. 323.

<sup>r</sup> Ord. xlii. 7, p. 320.

due after judgment. There are some cases, however, in which a *scire facias* will still be necessary, as where judgment has been entered against a corporation, and it is desired to enforce it against the members of the corporation liable for calls.

For the purpose of issuing execution, the judgment, or an office copy of it, must be produced to the officer of the Court,<sup>a</sup> and a *præcipe* containing the title of the action, the date of the judgment, and the writ required must be signed by the party or his solicitor and filed.<sup>t</sup> The writ itself is tested in the name of the Lord Chancellor, or if the office be vacant, in the name of the Chief Justice of England.<sup>u</sup> It is endorsed with the name and address of both solicitor and agent, or if none be employed, of the party issuing it.<sup>x</sup>

The writ is in general directed to the sheriff of the county in which it is to be executed. If it is to be executed within a liberty or franchise, it is directed to the sheriff of the county in which such liberty or franchise is situate: and, therefore, a writ to be executed in the borough of Southwark is directed to the sheriff of Surrey; and so a writ to be executed in the Isle of Ely is directed to the sheriff of Cambridgeshire. If the sheriff be a party, the writ should be directed to the other sheriff, if there be two; or, if there be but one, then to the coroners; and if the coroners also be parties, then to persons appointed by the Court, or nominated for the purpose, usually called *elisors*.

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<sup>a</sup> Ord. xlii. 9, p. 321.

<sup>t</sup> Ord. xlii. 10, p. 321.

<sup>u</sup> Ord. ii. 8, p. 251.

<sup>x</sup> Ord. xlii. 11, p. 321.



In the counties palatine, it is directed to the sheriff.<sup>y</sup> In Berwick-upon-Tweed, it is directed "To the mayor and bailiff of Berwick-upon-Tweed."

The writ should strictly pursue the judgment, and be warranted by it; otherwise it will be irregular, and may be set aside, unless allowed to be amended. It must pursue the judgment as to the parties, or show the reason why it does not. Thus, upon a judgment against two, the writ cannot be against one without showing upon the face of it a valid reason for its being so. Where there are several plaintiffs or defendants, and one of them dies, execution may be sued out by or against the survivors. But if in case of the death of a party it is desired to issue execution against his goods, his executor or administrator must be added as a party to the suit by virtue of an order, and, for the purpose of issuing execution against his lands, the heir and terre-tenants must be made parties. Similarly, an order must be obtained before issuing execution by an executor upon a judgment obtained by the deceased.<sup>z</sup>

The writ should also correspond with the judgment in the name of the defendant, even if he be described in the judgment by a wrong name.<sup>a</sup> It should agree in the mandatory part of it with the judgment in its amount, or show upon the face of it why it does not. Thus, if the writ in the mandatory part of it require the sheriff to

<sup>y</sup> C. L. P. Act, 1852, s. 122.

<sup>z</sup> Ord. xlii. 19, p. 323.

<sup>a</sup> *Reeves v. Slater*, 7 B. & C. 486.

levy a smaller sum than that for which judgment was given, the writ will be bad, unless it show upon the face of it why he is required to levy only the less sum; and for this reason, if there has been a levy under a writ, such levy must be recited in any subsequent writ. The writ, however, must always be endorsed to levy only the amount actually due, together with interest at four per cent., or a higher rate, if it is agreed between the parties to be secured by the judgment, from the date of the judgment to the time of executing.<sup>b</sup>

Where money has been paid on account, the writ should be endorsed to levy only the balance of the amount recovered. It may also be endorsed to levy the poundage, fees, and expenses of the execution.<sup>c</sup>

At common law it was necessary that there should be fifteen days between the teste and return of all writs of execution; but this was rendered unnecessary in the case of writs of *fi. fa.* and *ca. sa.* by statute. Writs of execution are now returnable "immediately after the execution thereof."

A writ of *fi. fa.* is not executed until the whole amount endorsed is levied under it, and may, if in the hands of the sheriff, be put in force after the levy of a part. But it must be remembered that writs of execution require to be revived, as the writ, if unexecuted, does not remain in force for more than one year from its issue, unless renewed. It may, before its expiration, by leave of

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<sup>b</sup> Ord. xlii. 14, p. 322.

<sup>c</sup> Ord. xlii. 13, p. 332; C. L. P. Act, 1852, s. 123.

the Court, be renewed for one year, and so on from time to time, either by being marked with a seal kept by the officers of the Court, bearing the date of the day, month, and year of such renewal, or by the party issuing the writ giving a written notice of renewal to the sheriff, signed by the party or his solicitor, and bearing the like seal of the Court.<sup>4</sup> A writ of execution so renewed has effect, and is entitled to priority, according to the time of its original delivery.

The party who has recovered a judgment for a sum of money may have a writ of *fi. fa.* or *elegit*, or *ca. sa.*, when it will lie, at his option; or, after suing out one, he may abandon it before it is executed, and sue out another; or he may even have several writs running at the same time, either of the same species into different counties, or of a different species, such as *fi. fa.* and *ca. sa.*, or the like into the same or different counties. Care, however, must be taken, as far as possible, that not more than one of these writs is executed, as if they be so, and there be any ground for imputing malice to the party issuing the same, he will be subject to an action on the case. If part only of the amount indorsed to be levied is levied on a *fi. fa.*, or if part be levied on the goods under an *elegit*, and "*nihil*" be returned as to the lands, a new writ of execution may be issued for the remainder. There must, however, be first a return to the first writ, if any part, however trifling, has been levied. It seems, also, that

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<sup>4</sup> Ord. xlii. 16, p. 322.

such further writ must recite the first writ, stating the amount levied under it. If, however, the sheriff seize goods under a *fi. fa.*, but the whole of them are already seized under a distress for rent, or are already "*in custodiâ legis*," or assigned under a bill of sale, and he afterwards withdraw the execution, another writ of execution may be issued and executed before the return of the *fi. fa.* If the debtor be taken under a *ca. sa.* on a judgment, no other writ can in general be executed against him or his effects in respect of the same judgment, unless he die in execution, or escape, or be rescued. So, if lands be extended on an *elegit*, and delivered to the plaintiff, a *fi. fa.* or *ca. sa.* cannot afterwards be executed against the defendant in respect of the judgment upon which the *elegit* issued.

When the writ is issued out it is taken to the sheriff's or deputy-sheriff's office, and, if desired, instructions can be given as to the officer to execute it. The sheriff himself, when the writ is directed to him, may personally execute it, and so may his under-sheriff without warrant; but to enable any other party to do so, there must be a warrant (which it would seem should be in writing) from the sheriff directed to him for that purpose. The person to whom it is directed is in general a bound bailiff, that is, a bailiff usually bound with sureties in an obligation for the due execution of his office; but it may be directed to a special bailiff nominated by the plaintiff or his solicitor. Where a writ is to be executed in a liberty or franchise within a county, the writ is directed to the sheriff of the

county, but should, unless it contain a "non omittas" clause, be executed by the bailiff of the liberty, to whom the sheriff directs his mandate for that purpose. The sheriff, and not the bailiff, must execute the writ if there be a clause of non omittas in it ; but if, even without a clause of non omittas, the sheriff execute the writ within the liberty, the execution will be good, although the sheriff may thereby render himself liable to an action at the suit of the lord of the franchise.

It is the duty of the sheriff to execute the writ within a reasonable time after he receives it for execution, and if he omit doing so, an action on the case may be supported against him by the party suing out the writ. It may be executed at any time before it is returnable, and while it is in force, and either by day or night, and on any day except Sunday. If the execution debtor die after a fi. fa. is sued out, the writ may, it seems notwithstanding, be executed on his goods in the hands of the executor. So, if the execution creditor die after execution sued out, the writ may, notwithstanding, be executed, and his executor shall have the money. If the debtor be discharged by the Bankruptcy Acts from the money recovered by the judgment after execution issued, or if the creditor countermand the execution, it should not be executed.

The writ may be executed at any place within the county, city, &c., to the sheriff of which the writ is directed, but not out of it. It cannot be executed in the Queen's presence, nor in the

courts of justice whilst the Queen's justices are there sitting, nor within the verge of her royal palace, unless by the leave of the Board of Green Cloth; nor in the Tower, except, perhaps, by leave of the governor. A palace clearly abandoned as a royal residence like Hampton Court has, however, no privilege.<sup>e</sup> Writs are now executed in counties palatine in the same way as in other counties.<sup>f</sup>

The sheriff may enter the house of the execution debtor when the outer door is open, or through any other opening, to seize his person or goods; and this, though neither he nor his goods be therein, if there is reasonable ground for suspecting that he or they are there. And the sheriff may enter the house of a third person to execute a *ca. sa.* or *fi. fa.*, if the defendant or his goods be actually therein, otherwise not.<sup>g</sup>

The sheriff cannot break open any outer door or window of a dwelling-house, in order to execute a writ of execution; unless in the case of a writ of *habere facias possessionem*, in which case he may, if necessary, break open the door, if he be denied entrance by the tenant.<sup>h</sup> If any person be present who can open the door, it should not be broken open without a previous demand and refusal of admission. It seems that the sheriff may open an outer door if it be only latched, and that

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<sup>e</sup> *Att.-Gen. v. Dakin*, 39 L. J. Ex. 113.

<sup>f</sup> C. L. P. Act, 1852, s. 122.

<sup>g</sup> *Morriah v. Murray*, 13 M. & W. 52.

<sup>h</sup> *Semayne's Case*, 5 Co. 91.

goods may be taken through the window of a house if open. Having got peaceable entrance, he may in all cases break open any inner door, cupboards, trunks, &c., if necessary.<sup>1</sup> If the defendant, after being arrested on a *capias*, escape into either his own or another's dwelling-house, the officer will be justified, on fresh pursuit, in breaking the outer door to retake him. Also, if, after a peaceable entrance of the party's dwelling-house, the sheriff or his officer be locked in, he may justify the breaking open the outer door in order to get out. So, it seems, if an officer being in a house for the purpose of executing a writ of execution, be forcibly turned out of it, he may, if necessary, break open an outer door to get in again.

In executing the writ, a sworn and known officer, be he sheriff, under-sheriff, bailiff, or serjeant, need not show his warrant or writ although demanded; but a special bailiff must show his warrant if the party demands it, otherwise the latter need not obey it. And the known officer, upon the execution of the writ, ought to declare the contents of his warrant, at whose suit he executes it, out of what Division it is issued, and when returnable, to the end that the defendant may pay the money.

The sheriff must by the Statute of Westminster raise the "*posse comitatus*," if it be necessary, in order to execute a writ of execution.

Care should be taken that the writ be executed against the right party; if executed against a

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<sup>1</sup> *R. v. Bird*, 2 Show. 87.

stranger, the sheriff will be liable to an action of trespass. A direction by the solicitor to the sheriff, to seize under a writ of execution, is an act done by an agent within the scope of his authority, and binds the principal: the client, therefore, is liable in trespass for the act of his solicitor in directing the sheriff to take the goods of a wrong party.<sup>k</sup>

Writs of execution may be amended like other proceedings.

Such being a general description of the mode of executing writs, it remains to describe more particularly the mode of executing a *fi. fa.* and an *elegit*.

In execution of the writ of *fi. fa.* the officer enters upon the premises in which the execution debtor's goods are, and leaves one of his assistants in possession of them. After the seizure, the officer gets an auctioneer to make an inventory of the goods, and to remove and sell them, or to sell them on the premises, if the debtor, or the person on whose premises the goods are, consent to it. He is allowed to remain on the premises a reasonable time to remove the goods. If he remains longer, without the leave of the occupier, he is liable to an action of trespass. It is his duty to remove the goods to a place of safe custody until they can be sold, for if they be rescued, he is liable to the execution creditor for their value. If there be several writs of *fi. fa.* in the sheriff's

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<sup>k</sup> *Jarmain v. Hooper*, 1 D. & L. 769 ; 7 Sc. N. R. 633.



hands at the time of the seizure, he is considered to seize under all of them.

The debtor instead of allowing the writ to be executed may pay the debt and costs as directed to be levied by the sheriff or officer. If the sheriff seize or sell the goods after a tender of debt and costs, he will, it seems, be a trespasser.

As to the nature of the goods which may be seized under a fi. fa., before an Act of the eighth year of the Queen the general rule of law was that the sheriff might seize and sell all the personal goods and chattels belonging to the execution debtor that he could find, and which could be sold, with the exception of wearing apparel actually in use, and perhaps goods in his personal possession. By that Act<sup>1</sup> the wearing apparel and bedding of any judgment debtor, or his family, and the tools and implements of his trade, the value of such articles not exceeding in the whole 5*l.*, are declared not liable to seizure under any execution. The sheriff, under a fi. fa., cannot sell an estate in fee or for life, unless perhaps "*pur autre vie.*" But he may sell a lease or term of years belonging to the debtor, and execute an assignment of it under his seal of office to the purchaser. The sheriff cannot, however, sell a mere equitable interest, such as an equity of redemption; nor things which are fixed to the freehold, and which go to the heir and not to the executor. Growing corn and other crops which are raised by the industry of man may be taken in

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<sup>1</sup> 8 & 9 Vict. c. 127 s. 8.

execution ; but fruits of the earth which yield no annual profit, or which are produced without the labour of man, cannot be taken in execution. The seizure and sale of straw, chaff, turnips, manure, hay, grasses, roots, vegetables, and growing crops on lands let to farm are regulated by express provisions.<sup>m</sup> The sheriff cannot take goods which are in the custody of the law, as by distress.

“Choses in action” could not at common law be seized in execution, but it is provided by statute that, under a *fi. fa.*, the sheriff may seize any money, bank notes, cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money, belonging to the debtor, and may pay or deliver to the execution creditor any money or bank notes which shall be so seized, or a sufficient part thereof ; and may hold any such cheques, bills, notes, bonds, specialties, or other securities for money, as a security for the amount directed to be levied, and the sheriff may sue in his own name for the recovery of the sum or sums secured thereby, when the time of payment thereof has arrived. The payment to the sheriff by the party liable on any such security, with or without suit, or the recovery and levying execution against the party, discharges him to the extent of the payment, or levy, from his liability on the security. The sheriff may pay over to the execution creditor the money so recovered, or such part thereof as is sufficient to discharge the amount directed to be levied ; and if, after satisfaction of the amount,

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<sup>m</sup> 5 & 6 Geo. III. c. 50 ; 14 & 15 Vict. c. 25, s. 2.

together with the sheriff's poundage and expenses, any surplus remains in the hands of the sheriff, the same is to be paid to the execution debtor. But the sheriff is not bound to sue any party liable upon any such security, unless the execution creditor enters into a bond, with two sufficient sureties, for indemnifying him from all costs and expenses which he may incur in the prosecution of the action, or to which he may become liable. The expense of the bond may be deducted out of any money recovered in the action.<sup>a</sup>

As to time at which the goods of a judgment debtor are bound by the writ, they were at common law bound from the time of its teste; so that they might have been taken, no matter into whose hands they had passed, and though sold *bonâ fide* after that time for a valuable consideration. However, by the Statute of Frauds the goods as against purchasers for valuable consideration, are bound only from the time of delivering the writ to the sheriff's deputy to be executed.<sup>o</sup> Before a further statutory provision on the subject, if, after the delivery of the writ, the party against whom it was issued assigned his goods away, except in market overt, the sheriff might take them in execution. But now no writ of execution prejudices the title to the goods of a debtor, acquired by any person *bonâ fide* and for a valuable consideration before their actual seizure provided the purchaser had not, at the time when he acquired title, notice that a writ under which

<sup>a</sup> 1 & 2 Vict. c. 110, s. 12.

<sup>o</sup> 29 Car. II. c. 3, s. 16.

the goods might be seized, had been delivered to the sheriff.<sup>p</sup>

There are other cases in which the sheriff may seize and sell goods of the debtor's assigned to another person before the writ is executed. If the assignment have been made before the delivery of the writ to the sheriff, but fraudulently for the purpose of delaying, hindering, or defrauding creditors, it will be void as against them. The fact that there was no valuable consideration for the assignment, as if it were made in consideration of natural love and affection is evidence of fraud. So, continuance in possession of goods and chattels by a vendor, after the execution of a bill of sale, is a badge and evidence of fraud, but not conclusive evidence of it. If the possession be consistent with the deed, as if it be a mortgage, and, by its terms, the debtor is to remain in possession until default, or a marriage settlement under which the debtor takes an equitable interest for life, or if the sale be notorious, as if it be made publicly by a sheriff under an execution, or by public auction, or if it be made with the knowledge and assent of the person who seeks to impugn it, the assignment is in general valid, though the vendor or original owner remain for some time in possession. A sale for good consideration is not fraudulent and void, merely because it is made with the intention to defeat an expected execution.<sup>q</sup>

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<sup>p</sup> 19 & 20 Vict. c. 97; *Gladstone v. Padwick*, 40 L. J. Ex. 154; L. R. 6 Ex. 203.

<sup>q</sup> *Wood v. Dixie*, 7 Q. B. 892.

The Bills of Sale Act,<sup>r</sup> entitled "An Act for preventing Frauds upon Creditors by Secret Bills of Sale of Personal Chattels," makes void as against execution creditors certain bills of sale unless registered as directed by that Act.

The sheriff may seize goods which are let to the debtor, but can only sell his interest therein. If he sell them absolutely, so as to determine the bailment, he will be liable to an action of trover, and this before the letting has expired. Goods upon which the debtor has a lien cannot be taken in execution.<sup>s</sup> Goods of his pawned or leased to another may be sold subject to the right of the pawnor or lessee, but not seized before the end of the bailment or term.<sup>t</sup> And if a party having a lien on goods causes them to be taken in execution at his own suit, he loses his lien thereby, although the goods are sold to him under the execution and are never removed off his premises.

If, after the sheriff has seized the goods, a third person claim them and the execution creditor still insist on his right to have them sold, the sheriff may apply under the Interpleader Act, and so get rid of his responsibility.

Before the removal of the goods from the premises, the landlord of the execution debtor, if any there be, has a right to be paid a year's rent by the execution creditor, if so much be due to

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<sup>r</sup> 17 & 18 Vict., c. 36 ; 41 & 42 Vict. c. 31.

<sup>s</sup> *Legg v. Evans*, 6 M. & W. 36.

<sup>t</sup> *Rogers v. Kennay*, 9 Q. B. 592.

him ; and the amount thus paid may be included in the levy against the debtor.<sup>u</sup> The present practice is for the sheriff to take enough to satisfy both the landlord and the execution creditor, and to make the payment to each of them. If the tenement be let at a weekly rent, the landlord has no claim or lien upon any goods taken in execution for more than four weeks' arrears of rent ; and if the tenement be let for any other term less than a year, the landlord has not any claim or lien on the goods for more than the arrears of rent accruing during four such terms or times of payment.<sup>x</sup> The Queen's taxes due at the time of the seizure, to the extent of one year's arrears, must be paid by the sheriff to the collector before sale or removal.<sup>y</sup>

The next step after the seizure of the goods, if the execution proceed, is to sell.

The sheriff cannot keep the goods himself and pay the execution creditor his debt, nor deliver them to the creditor in satisfaction of his debt, as may be done on an *elegit* ; but they must be sold, if the debtor do not immediately satisfy the creditor for the debt, costs, and expenses. There is no objection, however, to selling them to the creditor, or to any person in trust for him, at their real value. The sheriff must sell in a reasonable time, and if he neglects to do so, and the execution creditor thereby sustains damage, an action may be maintained against him for his breach of duty.

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<sup>u</sup> 8 Anne, c. 14.

<sup>x</sup> 7 & 8 Vict. c. 96, s. 67.

<sup>y</sup> 43 Geo. III. c. 99, s. 37.

If the sheriff sells more goods than are sufficient to satisfy the writ, he is liable in trover for the goods unnecessarily sold. The sheriff should sell for the best price that can be reasonably obtained, and for ready money and immediate delivery. An assignment of a term of years must be in writing; but goods may be sold by the sheriff in any way. Besides the amount of the debt, the sheriff always levies his poundage and expenses.

The sale or assignment by the sheriff of the goods or chattels of the debtor taken on a *fi. fa.* conveys an indefeasible title to a *bonâ fide* vendee; so much so, that, if the writ be afterwards vacated the debtor is not restored to his goods. But, if the writ were void, as if it issued without jurisdiction, or if the goods were the goods of a stranger, and not of the debtor, the sale of the sheriff would convey no property, and the real owner may recover even against a *bonâ fide* purchaser for value.

With regard to executions against the goods of a bankrupt, the legislature has from time to time made enactments on this subject, in order to prevent any hardship arising from the title of the trustees having reference back to an act of bankruptcy. By the Bankruptcy Act, 1869, subject and without prejudice to the provisions relating to the proceeds of the sale and seizure of the goods of a trader, and avoiding certain fraudulent preferences, any execution or attachment against the goods of any bankrupt executed in good faith by

seizure and sale before the date of the order of adjudication, if the person on whose account the execution or attachment was issued had not, at the time of its being executed by seizure and sale, notice of any act of bankruptcy committed by the bankrupt and available against him for adjudication, is valid.<sup>a</sup> It is important, therefore, in general, where an execution issues against a person who is likely to become a bankrupt, to sell under the execution as soon as possible. An execution creditor only requires the protection of this section where an act of bankruptcy has been committed prior to the seizure. Where the sheriff has under an execution for less than fifty pounds seized a debtor's goods before any act of bankruptcy, the judgment creditor's claim to be paid out of the goods is not defeated by the debtor's subsequent bankruptcy, though the sheriff do not sell till after the adjudication.<sup>a</sup>

An execution is, however, frequently itself an act of bankruptcy, and in that case it has some peculiar incidents. A trader debtor commits an act of bankruptcy if an execution for not less than fifty pounds is executed by seizure and sale of his goods.<sup>b</sup> Where the goods of a trader are taken in execution in respect of a judgment for a sum exceeding fifty pounds, and sold, the sheriff is to retain the proceeds of such sale in his hands for a period of fourteen days, and upon notice being

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<sup>a</sup> 32 & 33 Vict. c. 71, s. 95.

<sup>a</sup> *Slater v. Pinder*, 41 L. J. Ex. 66; L. R. 7 Ex. 95.

<sup>b</sup> 32 & 33 Vict. c. 71, s. 6; L. R. 7 Ex. 95.



served on him within that period of a bankruptcy petition having been presented against such trader, is to hold the proceeds of such sale, after deducting expenses, in trust, to pay the same to the trustee under the bankruptcy; but if no notice of such petition is served, or if, after such notice, the trader is not adjudged a bankrupt on such petition, or any other petition of which the sheriff has notice, he may deal with the proceeds of such sale in the ordinary way.<sup>c</sup>

Sometimes more than one writ is issued against the same person, or a County Court warrant as well as a writ is issued.

If two writs of *fi. fa.* against the same person are delivered to the sheriff, he must execute that writ first which was first delivered to him, even though both were delivered upon the same day; that is to say, he must apply the proceeds of any sale under them in satisfaction of that writ first, which was first delivered to him; for when the sheriff seizes the goods, they are in point of law in his custody under all the writs which he then has; and when he sells, he does so also in point of law under all such writs. If the sheriff, when the second writ is delivered to him, has seized goods under the first, he may be said, immediately upon the delivery of the latter writ, to have seized the goods under that also. But if the first writ, or the possession held under it, be fraudulent, or be set aside or withdrawn, or be void as against

trustees under the Bankruptcy Laws, the second has priority. The goods are bound by the second writ from the date of the delivery of it to the sheriff, subject of course to the first execution.

When a writ has issued from the High Court against the goods of a party, and a warrant against the goods of the same party has issued from a County Court, the right to the goods seized is determined by the priority of the time of the delivery of the writ to the sheriff to be executed, or of the application to the registrar for the issue of the warrant to be executed.<sup>d</sup>

When the writ becomes returnable the sheriff may return "*fieri feci*," *i.e.*, that he has levied the sum named in the writ, or a part of it, which he is ready to pay to the execution creditor; or that he has taken goods which remain unsold for want of buyers; or "*nulla bona*," *i.e.*, that the execution debtor has no goods within his bailiwick; or any other legal excuse for not levying.

If the sheriff return that he has taken goods, but that they remain in his hands for want of buyers, and he be still in office, a writ of "*venditioni exponas*" may be sued out in order to compel a sale of the goods; though, indeed, he may and ought to sell without it, and an action on the case might be maintained against him, if he omit selling in a reasonable time, whereby any damage is sustained by the party suing out the *fi. fa.* This

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<sup>d</sup> 19 & 20 Vict. c. 108, s. 47.

writ is not a process distinct from the *fi. fa.*, but a branch of it; it is a writ directing the sheriff to execute the *fi. fa.* in a particular manner. After the delivery of the *venditioni exponas* to the sheriff, he is bound to sell the goods, and have the money in Court on the return day of it. In making a sale of goods under it, the sheriff is not bound by the value set upon the goods in his return to the *fi. fa.*; but otherwise if they be rescued from him or the like, so that he cannot make a sale of them.

Where a sheriff goes out of office, after returning that he has levied, but that the goods remain in his hands for want of buyers, instead of suing out a *venditioni exponas* the execution creditor may sue out a "*distringas nuper vicecomitem*," directed to the present sheriff, commanding him to distrain the late sheriff to sell the goods. Or, if goods sufficient to satisfy only a part of the debt were seized under the first writ, the execution creditor may have a *distringas* for that part, and a *fi. fa.* for the residue in one writ. The former sheriff must thereupon sell the goods and pay over the money, otherwise he will forfeit "issues" or fines to the amount of the debt.

If *nulla bona* be returned to the *fi. fa.* an "*alias fi. fa.*" may be sued out, and upon the return of *nulla bona* to that, a "*pluries fi. fa.*" may be issued. In practice, in the above cases, where nothing has been in fact levied, it is usual to issue the subsequent writ without getting the return previously made; and so long as the return is made in time

to show cause against an application to set aside the subsequent writ for irregularity for the want of it, that will suffice. If the sheriff has levied part of the debt, the execution creditor, upon the writ being returned, may sue out a fieri facias for the residue, but in this case it is absolutely necessary to get the return made before issuing the subsequent writ, as such writ recites the first, and the sheriff's return to it.

If the execution creditor from mistake indorse a fi. fa. for less than he is entitled to, the Court may, on conditions, allow him to take out a fi. fa. for the residue.

If nothing, in fact, be levied under a fi. fa. so that nulla bona might be returned to it, the execution creditor may sue out a ca. sa. or elegit. So, if fieri feci be returned as to part, he may sue out a ca. sa. when it will lie, or an elegit for the residue.

As soon as the sheriff seizes the goods under the writ, the debtor is thereby absolutely discharged to the extent of the levy, whether the sheriff sells the goods or return the writ or not, or though they afterwards be rescued from him; and he may plead this to a scire facias or action on the judgment; or if another writ be sued out against him for the same debt, he may be relieved upon motion. But if judgment be obtained against several persons, and the goods of one of them be seized but not sold, this will not discharge the others, because it is no actual satisfaction.

The sheriff is liable to the execution creditor

for the amount of the levy. If fieri feci be returned, the money may be recovered by rule of Court or by action.

The mode of executing an elegit must next be considered. Upon the receipt of the elegit, the sheriff must empanel a jury, who are to inquire of all the goods and chattels of the debtor, and appraise the same, and also to inquire as to his lands and tenements and their value. Upon the inquisition had, the sheriff is to deliver to the execution creditor all the goods and chattels of the debtor, except his oxen and beasts of the plough, at the value set upon them by the jury, and if the goods be sufficient to satisfy the debt, the lands cannot be extended. If, however, the goods be insufficient, the sheriff is to proceed to make and deliver execution to the execution creditor of all the lands of the debtor, after being valued by the jury, and must return the writ in order that the execution may be recorded in the Court. It is not, however, now necessary, as it was formerly, to describe the lands by metes and bounds in the inquisition. The sheriff delivers only legal possession of the lands. Actual possession may be recovered by bringing ejectment; but it is not necessary to bring ejectment if possession can be obtained without doing so. Where a reversion is extended, ejectment cannot be brought.

At common law, lands in which a party was beneficially interested, as cestui que trust, could not be extended under an elegit issued against

him; but the Statute of Frauds<sup>e</sup> makes some species of trust property to which the defendant was entitled at the time of execution sued so extendible.

The statute of the first year of the Queen, already referred to, greatly enlarged the effect of the writ of *elegit*. As a general rule, the *elegit* creditor may now extend the whole of the debtor's lands instead of a moiety. Subject to the rights of the lord of the manor, the debtor's customary and copyhold lands may be extended, which could not be done before the Act. Lands over which the debtor has any disposing power which he may, without the assent of any other person, exercise for his own benefit, may be extended. This could not be done before the Act, and even estates tail in possession were not liable to be extended after the death of the debtor. Trust estates are now put upon the same footing as to the time at which they are bound by the judgment, as estates held in the debtor's own name.<sup>f</sup>

It seems that an advowson in gross cannot be extended under an *elegit*; nor can the glebe belonging to an ecclesiastical benefice, or the churchyard, because they are each "*solum Deo consecratum*:" nor can a rent seck; nor any tenement which cannot be granted over, as the office of a filacer or the like; nor an equity of redemption.

The Bankruptcy Act, 1869, provides that, subject

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<sup>e</sup> 29 Car. II. c. 3, s. 10.

<sup>f</sup> 1 & 2 Vict. c. 110, s. 11.

and without prejudice to the provisions of that Act avoiding certain settlements and fraudulent preferences, any execution or attachment against the land of the bankrupt, executed in good faith by seizure before the date of the order of adjudication, shall be valid if the execution creditor had not notice of any act of bankruptcy.<sup>g</sup>

The time at which the land of a judgment debtor is bound by a writ of execution has gone through several changes, as in the case of execution upon goods. A judgment entered before the 23rd July, 1860, bound all the land which the debtor possessed at the time the judgment was entered, but in order to affect purchasers, mortgagees, and creditors the judgment must have been registered. Further, judgments entered after that date as against *bonâ fide* purchasers and mortgagees only affected the land possessed by the debtor at the time a writ had been issued, registered and executed.<sup>h</sup> Finally, a judgment entered since the 29th July, 1864, does not affect land until it has actually been delivered in execution.<sup>i</sup>

If no land be extended upon an *elegit*, the execution creditor may of course have an *elegit* into another county; or even if lands be extended, the creditor, on a suggestion that the debtor has more lands in the same or another county, may have another *elegit*, directed to the sheriff of such county. But where land is extended upon an

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<sup>g</sup> 32 & 33 Vict. c. 71, s. 95.

<sup>h</sup> 23 & 24 Vict. c. 38.

<sup>i</sup> 27 & 28 Vict. c. 112, s. 1.

elegit, no other form of execution can be employed against the debtor's person or property, unless the creditor be evicted from the lands extended.

The execution creditor having thus obtained possession of the lands may retain them until he has satisfied the judgment out of the rents and profits. In that case, when the judgment is satisfied, the debtor may recover the land back, either by an action of ejectment, or by a "*scire facias ad rehabendam terram*." Before the judgment is so satisfied, the debtor, upon tendering to the plaintiff in Court whatever may be deficient in the amount of the judgment, may recover the land by a *scire facias ad rehabendam terram*. Or the debtor may proceed in equity; or apply to the Court out of which the *elegit* issued, to refer it to one of the masters to ascertain the amount of the rents and profits received, and to order that if it appear that the debt is satisfied, possession shall be delivered to the debtor.

It is expressly provided by the statute that the *elegit* creditor shall render an account in the Court out of which the execution is sued, a liability to which a tenant by *elegit* was subject in a Court of Equity before the Act.<sup>k</sup>

With regard to judgments entered since the 29th July, 1864, a more effectual remedy is given to the creditor than satisfying his judgment out of rents as tenant by *elegit*. He may obtain an order in the Chancery Division of the High Court for

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<sup>k</sup> 1 & 2 Vict. c. 110.



the sale of the debtor's interest for the purpose of applying the proceeds to the satisfaction of his judgment.<sup>1</sup>

The next consideration is the return of the writ. It is not usual for the sheriff to return writs of execution unless ruled or ordered to do so, although in strictness he is bound to return them when executed. In some cases it is absolutely necessary that the writ should be returned. Thus, if lands be extended on an *elegit*, the writ and the inquisition held under it must be returned, otherwise the tenant by *elegit* will have no title. Also, where the full amount of the judgment is not realised by the writ, and it is expedient to issue another writ to enforce payment of the remainder, it is, as we have seen, essential that the first writ should be returned, in order to recite the return in the fresh writ. It may sometimes be advisable to compel the sheriff to return the writ, in order to prevent improper conduct in the officer. The sheriff cannot be ruled to return the writ where there has been any collusion between the sheriff's officer and the plaintiff or his solicitor, or where the action or execution has been compromised, or where the writ has been executed by a special bailiff<sup>m</sup> or the like; and if so ruled the sheriff may apply to the Court or a judge to set aside the rule.

The sheriff can only be thus ruled to return the

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<sup>1</sup> 27 & 28 Vict. c. 112, ss. 4, 5, 6.

<sup>m</sup> *Pallister v. Pallister*, 1 Chit. Rep. 614, n.; *Harding v. Holder*, 2 M. & G. 914; 3 Sc. N. R. 293.

writ whilst he is in office, or within six calendar months after he goes out of it.

The party issuing the writ may in general rule the sheriff to return it if it become necessary for him to have such return. The party against whom the writ is issued may rule the sheriff to return it after the object of the writ has been effected, but it seems that this cannot be done by such party before that time, except on special grounds. No judge's order is required for the return of a writ, but a side-bar rule issues. The rule calls upon the sheriff to return the writ within a certain time after notice to be given to his under-sheriff. All rules upon the sheriffs of London and Middlesex to return writs are four-day rules, and upon other sheriffs, eight-day rules.<sup>n</sup> A copy of the rule with the name of the officer by whom the writ was executed indorsed on it must be served at the office of the sheriff's deputy. The time limited by the rule for making the return may be enlarged by order, and this is often allowed where the justice of the case requires it for the sheriff's protection; as where there are adverse claims to the goods seized under a *fi. fa.*

The sheriff must return the writ within the time limited or, if the offices be closed, as soon as they open, otherwise he will be in contempt, and subject to an attachment.<sup>o</sup> In order to make sheriffs punctual in their return of writs, it is ordered that "the officer with whom it is filed

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<sup>n</sup> R. 180, H. T. 1853.

<sup>o</sup> R. 181, H. T. 1853.

shall endorse the day and hour when it was filed."<sup>p</sup>

The return must be certain, but so much certainty is not required as in pleading. When the bailiff of a liberty has the execution and return of a writ, the sheriff may return that he commanded the bailiff to execute the writ; and if the bailiff has not made a return, the sheriff should return that fact accordingly; or if he has made a return, the sheriff should return it.

The return is conclusive between the same parties in the same action, but not against other parties or in another action.<sup>q</sup> Even in another action, however, the return is *prima facie* evidence of the facts stated in it. The sheriff is generally concluded by his return; and the bailiff of a liberty is, it seems, concluded by it, although false, and his remedy over is against the sheriff. But the sheriff's officer is not, for the purpose of his own justification, so concluded. In a return to a writ of *fi. fa.* the sheriff is not bound by the value of the goods he returns.

The Court will not, in general, try the truth of a return on affidavits. But if the return be false, the party who is injured by it may maintain an action against the sheriff.<sup>r</sup> Therefore, if the sheriff return "*non est inventus*," when he has

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<sup>p</sup> R. 131, H. T. 1853.

<sup>q</sup> *Jackson v. Hill*, 10 Ad. & El. 477; *Stimson v. Farnham*, 41 L. J. Q. B. 52; L. R. 7 Q. B. 175.

<sup>r</sup> See *Wylie v. Birch*, 4 Q. B. 566; *Stimson v. Farnham*, *ub. supr.*

taken, or might have taken, the defendant, he is liable to an action. So, if he return nulla bona to a writ of *fi. fa.*, when he has had an opportunity of making a levy, the execution creditor may bring an action against the sheriff for the false return. The return may in general be amended.

If the writ of execution be irregular, or ought not to have issued, it will, like other processes of the Court, be set aside, and, if goods or money have been levied under it, they will be ordered to be restored. So, if the execution has been irregularly executed, such restoration or discharge will be ordered. But the execution will not, in general, be set aside where too large a sum has been levied; all the Court or a judge will do in such a case is to compel the execution creditor to refund the overplus. In setting aside the execution, the Court, unless the debtor was entitled to it as a matter of right, will in general restrain him from bringing any action, unless a strong case of damage be shown; and even where the debtor is entitled to set aside the execution, *ex debito justitiæ*, the Court will not in general give him his costs of the rule for that purpose, unless he will consent not to bring any action.\* Although the writ be irregular yet, unless it be set aside, the party at whose suit it is issued and his solicitor may justify under it. But after it has been set aside for irregularity, or on the ground that it was issued in bad faith, they cannot do so; and the latter is liable in trespass,

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\* *Cash v. Wells*, 1 B. & Ad. 375; *Rhodes v. Hull*, 26 L. J. Exch. 265.

as well as the former, for an arrest or the like made under it.<sup>t</sup> Whether set aside or not, the sheriff and his officer, and all persons acting under the sheriff, are, in general, protected by it, however irregular, provided it be not void on the face of it, or did not issue without jurisdiction, and provided he or they do not join in the same plea with the party.<sup>u</sup> The setting aside of the writ does not prevent the party from issuing and executing another writ.

A mode of executing a judgment by the "attachment of the debts" of the judgment debtor was first given by the Common Law Procedure Act, 1854, and is now adopted by the High Court. It is somewhat analogous to the ancient proceeding by "foreign attachment" in use in the Mayor's Court of London and similar municipal Courts. By a foreign attachment, however, debts are attached for the purpose of compelling the defendant to appear and put in bail in the action; whereas the attachment in the High Court only comes into use after judgment.

With this view a judgment creditor may obtain an order that the judgment debtor be orally examined before an officer of the Court as to what debts are owing to him, and for the production by the debtor of books and documents.<sup>x</sup> A judge

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<sup>t</sup> *Codrington v. Lloyd*, 8 Ad. & El. 449; *Smith v. Sydney*, 39 L. J. Q. B. 144.

<sup>u</sup> *Woolley v. Clarke*, 5 B. & Ald. 744; *Phillips v. Biron*, 1 Str. 509.

<sup>x</sup> Ord. xlv. 1, p. 324.

may, either before or after such oral examination, upon the *ex parte* application of the judgment creditor, upon affidavit stating that judgment has been recovered, and that it is still unsatisfied, and that any other person is indebted to the judgment debtor, and is within the jurisdiction, order that all debts owing or accruing from such third person to the judgment debtor shall be attached to answer the judgment debt. Such third person, or "garnishee," may be ordered to appear to show cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt.<sup>7</sup>

All debts due to the debtor, in which he is beneficially interested, and for which he can sue, can in general be attached. Debts due to a corporation, unless exempted by Act of Parliament, may be so attached. So may part of a debt. It seems that the proceeds of an execution may be attached in the sheriff's hands for a debt due from the execution creditor. Rent owing to the judgment debtor may be attached.<sup>8</sup> A judgment debtor who is an executor or administrator is within the garnishee clauses of the Common Law Procedure Act, 1854; and, therefore, a debt due to such judgment debtor, in his representative capacity, may be attached by a judgment creditor of the executor in the same right. On a joint judgment

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<sup>7</sup> Ord. xlv. 2, p. 325.

<sup>8</sup> *Mitchell v. Lee*, 36 L. J. Q. B. 154; L. R. 2 Q. B. 259.

against several, a debt due to any one or more of the judgment debtors may be attached.

As a general rule, debts or money which the debtor cannot sue for cannot be attached. A superannuation allowance granted by a resolution of the board of directors of the East India Company to a retired clerk under the authority of a statute cannot be attached, as the same is only a gratuity, and the grant is not by deed. Nor can unliquidated damages be attached, even after verdict, but before judgment; nor dividends payable under a bankruptcy; nor debts in which the debtor is not beneficially interested; nor money ordered to be paid by a rule of Court; nor the property of an intestate in the hands of the ordinary. The property of a foreign ambassador or a foreign potentate cannot be attached. Where there are mutual debts between the debtor and the garnishee, the judgment creditor can only recover the balance against the garnishee.

Service of the order for the attachment of a debt on the garnishee, or notice to him of the order given in such manner as may be directed binds the debt in his hands.<sup>a</sup> The attachment of a judgment debt overrides a solicitor's lien on or control over the judgment, in respect of general costs due to him from the garnishee.<sup>b</sup>

If the garnishee does not pay into Court the debt due from him, or the judgment debt, and does not dispute the debt claimed to be due from

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<sup>a</sup> Ord. xlv. 3, p. 325.

<sup>b</sup> C. L. P. Act, 1854, s. 62.

him, or if he does not appear upon summons, then the judge may order execution to issue summarily to levy the amount due from the garnishee towards satisfaction of the judgment debt.<sup>c</sup> Where an order is made upon a garnishee to pay an accruing debt, execution cannot be issued against him until the debt is due.

If the garnishee dispute his liability, the judge may order any issue necessary for determining the question to be tried.<sup>d</sup>

A third person alleged to hold a lien on the debt may be ordered to appear, and any necessary order may be made.<sup>e</sup>

Payment made by, or execution levied upon, the garnishee under any such proceeding is a valid discharge to him as against the judgment debtor to the amount paid or levied, although the proceeding be set aside or the judgment reversed.<sup>f</sup> A garnishee is not protected if he pay the debt to the judgment creditor before a judge's order has been obtained directing such payment.<sup>g</sup>

In each of the Divisions there is kept a debt attachment book, wherein entries are made of the attachment and proceedings thereon. Copies of such entries may be taken by any person.<sup>h</sup>

The costs of and incidental to the application for the attachment are in the discretion of the Court or a judge.<sup>i</sup>

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<sup>c</sup> Ord. xlv. 4, p. 325.

<sup>d</sup> Ord. xlv. 5, p. 325.

<sup>e</sup> Ord. xlv. 6, 7, p. 326.

<sup>f</sup> Ord. xlv. 8, p. 326.

<sup>g</sup> *Turner v. Jones*, 26 L. J. Ex. 262.

<sup>h</sup> Ord. xlv. 9, p. 326.

<sup>i</sup> Ord. xlv. 10, p. 326.



Another form of execution analogous to the attachment of a debt is a "charging order." This order directs that any government stock, funds or annuities, or any stock or shares of or in a public company in England, whether incorporated or not, standing in the name of the debtor in his own right, or in the name of any person in trust for him, shall stand charged with the payment of the judgment debt and interest. The charge cannot be enforced for six calendar months after the order, and is relinquished by the creditor taking the debtor in execution on the judgment.<sup>k</sup>

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<sup>k</sup> 1 & 2 Vict. c. 110, ss. 14-16; 3 & 4 Vict. c. 82.

## CHAPTER XI.

## APPEAL.

AN appeal is a proceeding by which a judgment in the High Court of Justice is called in question before the Court of Appeal. It takes the place of error and appeal in the Courts of Common Law, and of appeal in Chancery, to which latter proceedings it is very closely assimilated.

Error was an appeal against a judgment grounded either on the suggestion of some fact affecting the validity and regularity of the action, as, for instance, that the unsuccessful party was an infant, and appeared by attorney; or on some error in point of law apparent on the face of the proceedings. When it was grounded upon a suggestion of a fact, it was brought in that one of the Courts at Westminster in which the judgment was given. Such a proceeding was called error "*coram vobis*," or if the judgment were one of the Queen's Bench, "*coram nobis*." Error in law was brought from either of the three Courts at Westminster to a Court of Appeal. Until 1830 errors from the Common Pleas were prosecuted in the Queen's Bench, and errors from the Exchequer

and the Queen's Bench on its original side to the Exchequer Chamber, but in that year it was provided that errors from either of the three Courts of Common Law should be heard in the Court of Exchequer Chamber by judges of the other two Courts.

Error was originally brought by writ sued out of the Court of Chancery, and directed to the person in the Court below who had the custody of the record; as, in the Queen's Bench and Common Pleas, to the Lord Chief Justice; in the Exchequer, to the Treasurer and Barons. It commanded the inferior Court to certify the record to the Court of Appeal, which was directed to examine it and affirm or reverse the judgment according to law. By the Common Law Procedure Act, 1852, a writ of error was made unnecessary, and the proceeding to error became a step in the cause.

The proceeding called "appeal" as distinguished from error in the Courts of Common Law, owed its origin to the Common Law Procedure Act, 1852. It was applicable to cases in which the Court of first instance granted or refused to grant a new trial or enter a verdict or nonsuit, such grant or refusal, as it did not appear on the record, not being a subject for error. The appeal always lay if the point were reserved at the trial, or if the rule were for misdirection, and one of the judges dissented. The facts raising the question were stated in a special case.

In the Court of Chancery an appeal was allowed from the order or decree of the Master of the

Rolls or a Vice-Chancellor to the Lord Chancellor or the Lords Justices of Appeal, who were appointed in 1851 to assist him in his appellate duties. The form of appeal was by a petition to the Lord Chancellor, and the appeal was looked upon as a rehearing.

The Judicature Acts provide a uniform procedure of appeal, by way of rehearing, for the Supreme Court of Judicature. Proceedings in error are abolished,<sup>a</sup> and there is to be no special case or petition, but the appeal is brought by a simple notice of motion.<sup>b</sup> An appeal may be carried to the Court of Appeal upon any order or judgment of the High Court of Justice. No appeal can be brought on an interlocutory order after the expiration of twenty-one days, or on a final judgment after one year, without the leave of the Court of Appeal.<sup>c</sup> An order made in an interpleader issue is an interlocutory order, because it rather arises out of the action brought against the person interpleading than is a final judgment.<sup>d</sup> Leave to sign final judgment under Order XIV. has also been held to be an interlocutory order for the somewhat refined reason that the order is not a final judgment itself but a permission to sign it.<sup>e</sup> The time for appealing begins to run in the case where an order is made from the drawing up or perfect-

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<sup>a</sup> Ord. lviii. 1, p. 339.

<sup>b</sup> Ord. lviii. 2, p. 339.

<sup>c</sup> Ord. lviii. 15, p. 343.

<sup>d</sup> *McAndrew v. Barker*, 47 L. J. Ch. 340.

<sup>e</sup> *Standard Discount Co. v. De la Grange*, 47 L. J. Q. B. 3.

ing the order; when the order is refused from the date of the refusal; when the application is partly granted and partly refused time for appeal against the refusal runs from the refusal, not the order.<sup>g</sup> Four days' notice of appeal must be given in the case of an interlocutory order, and fourteen days' notice in the case of a judgment.<sup>h</sup> The notice of appeal must be served on all parties directly affected by the appeal, but the Court may adjourn the case for the purpose of serving other parties, and may amend the notice in any way.<sup>i</sup> If the party appealed against desire himself to call the decision in question, he need not bring a cross appeal, but may give notice that he intends to contend that the decision of the Court below should be varied.<sup>k</sup> In the case of a final judgment, this notice must be an eight days' notice; in the case of an interlocutory order, two days' notice.<sup>l</sup>

The appeal is entered by the appellant producing to the officer of the Court the order or judgment, or an office copy of it, and leaving a copy of the notice of appeal.<sup>m</sup> It is then entered in the list of appeals.

An appeal may be made against the refusal by the High Court of an *ex parte* application, by moving *ex parte* within four days from the date of the refusal.<sup>n</sup>

So soon as the notice has expired, and the case

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<sup>g</sup> *Trail v. Jackson*, 46 L. J. Ch. 16.

<sup>h</sup> Ord. lviii. 4, p. 340.

<sup>k</sup> Ord. lviii. 6, p. 341.

<sup>m</sup> Ord. lviii. 8, p. 341.

<sup>i</sup> Ord. lviii. 3, p. 340.

<sup>j</sup> Ord. lviii. 7, p. 341.

<sup>n</sup> Ord. lviii. 10, p. 342.

is reached in the list, the appeal is heard. Two counsel are heard on each side, and the appellant's counsel has the right of reply. If the appeal be on a question of fact, the evidence is brought before the Court of Appeal on the affidavits, or the notes of the judge taken at the trial.<sup>o</sup> The Court of Appeal may receive further evidence either by oral examination of witnesses in Court or by affidavit or deposition taken before an examiner. If the appeal be against an interlocutory order, or the facts have occurred since the decision appealed against, leave to produce further evidence is not necessary. In other cases, special grounds must be shown, and special leave obtained. The Court of Appeal has all the powers of the High Court, and may make any order which ought to have been made. They may do this without restriction, although the notice of appeal refer only to part of the decision, and although the respondent has not given notice of an intention to contend that the decision should be varied.<sup>p</sup> They may reverse the judgment of the High Court on the question of costs, and they may make such order as to the costs of appeal as they think fit; the general rule being that the successful party is to obtain the costs of appeal. No appeal, however, can be brought on a question of costs only, except by leave of the Court making the order,<sup>q</sup> but this rule does not apply to an order directing the costs, charges, and expenses of a trustee to be paid.<sup>r</sup>

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<sup>o</sup> Ord. lviii. 11, p. 342.

<sup>p</sup> Ord. lviii. 5, p. 340.

<sup>q</sup> Jud. Act, 1873, s. 49.

<sup>r</sup> *Jones v. Chennell*, 47 L. J. Ch. 583.

Formerly bringing error operated as a stay of execution on giving bail or making a deposit. Under the present practice, an order is required for an appeal to operate as a stay, and a condition of this order is usually that the appellant find security.<sup>a</sup>

Before the Judicature Acts the decision appealed against in the Courts of common law was that of a Court in banc, or what is now called a divisional Court, which was the judicial unit of each of the common law courts. Questions of law raised at the trial always came before the Court in banc before they went to the Exchequer Chamber. Now, however, by the Appellate Jurisdiction Act, 1876, it is provided that every action, so far as practicable, shall be disposed of before a single judge,<sup>b</sup> which is the ordinary practice in Chancery, but an innovation at common law. Accordingly an appeal lies from a judge at *Nisi Prius* directly to the Court of Appeal, unless a new trial is asked for, in which case a divisional Court must be moved. When, therefore, the judge tries a case without a jury, or is alleged to have entered the verdict wrongly according to the findings, the appeal lies to the Court of Appeal.<sup>c</sup>

From any order or judgment of the Court of Appeal an appeal lies, as formerly, from the Lord Chancellor and Lords Justices in Chancery cases

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<sup>a</sup> Ord. lviii. 16.

<sup>b</sup> 39 & 40 Vict. c. 59, s. 17.

<sup>c</sup> Ord. xl 4.

and the Exchequer Chamber in common law cases, to the House of Lords,\* but the proceedings in the Court of Appeal bring to a close the history of an action in the Supreme Court.

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\* App. Act, 1876, s. 3.



## APPENDIX OF SELECTED FORMS.\*

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- I. FORMS IN AN ACTION OF FRAUD.
- II. SPECIALLY INDORSED WRIT AND JUDGMENT BY DEFAULT  
IN A DISTRICT REGISTRY.
- III. PLEADINGS IN AN ADMINISTRATION ACTION.
- IV. PLEADINGS IN A PROBATE ACTION.
- V. WARRANT AND PLEADINGS IN AN ADMIRALTY ACTION  
IN REM.

### I.

#### FORMS IN AN ACTION OF FRAUD.

##### FORM 1.

##### *Writ of Summons.*

1878. B. No. 233.

In the High Court of Justice.  
Queen's Bench Division.

Between A.B. Plaintiff,  
and  
C.D. Defendant.

Victoria, by the grace of God of the United Kingdom  
of Great Britain and Ireland, Queen, Defender of the  
Faith.

To C. D. of U. V. Street, in the county of Middlesex.

We command you, That within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you

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\* These forms are chosen from the Appendices to the Judicature Act of 1875, as samples of the documentary proceedings in an action. They are filled up and arranged in groups.

in the Queen's Bench Division of Our High Court of Justice in an action at the suit of *A.B.*; and take notice, that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence. Witness, The Right Honourable Hugh MacCalmont Baron Cairns, Lord High Chancellor of Great Britain, at Westminster, the 1st day of December one thousand eight hundred and seventy-eight.

N.B.—This writ is to be served within twelve calendar months from the date thereof, or if renewed, from the date of such renewal, including the day of such date, and not afterwards.

The defendant may appear hereto by entering an appearance either personally or by solicitor at the office of the Queen's Bench Division, Inner Temple, London.

*Indorsements on the writ made before issue.*

The plaintiff's claim is for damages for fraudulent misrepresentation on the sale of a business.

This writ was issued by *E.F.*, of 14, K. B. W., Temple, London, solicitor for the said plaintiff, who resides at 20, K. Street, London, N.

*Indorsement made on the writ after service.*

This writ was served by *X.Y.* on *C.D.*, the defendant, on Tuesday, the 3rd day of December, 1878.

(Signed)

*X.Y.*

FORM 2.

*Memorandum of Appearance.*

1878. B. No. 233.

High Court of Justice.

Queen's Bench Division.

*A.B. v. C.D.*

Enter an appearance for *C.D.* in this action.

Dated this 10th day of December, 1878.

*Z.*,

Solicitor for the defendant.

The place of business of *Z.* is 99, O S., Lincoln's Inn.

His address for service is the same.

The said defendant requires a statement of claim to be filed and delivered.

## FORM 3.

1878. B. No. 233.

In the High Court of Justice.

Queen's Bench Division.

Writ issued 1st December, 1878.

Between *A.B.* Plaintiff,  
and  
*C.D.* Defendant.

*Statement of Claim.*

1. On or about 3rd March, 1878, the defendant caused to be inserted in the Daily Telegraph newspaper an advertisement, in which he offered for sale the lease, fixtures, fittings, goodwill, and stock-in-trade of a baker's shop and business, and described the same as an increasing business, and doing twelve sacks a week. The advertisement directed application for particulars to be made to *L.M.*

2. The plaintiff having seen the advertisement applied to *L.M.*, who placed him in communication with the defendant, and negotiations ensued between the plaintiff and the defendant for the sale to the plaintiff of the defendant's bakery in C. L. Street, London, with the lease, fixtures, fittings, stock-in-trade, and goodwill.

3. In the course of these negotiations the defendant repeatedly stated to the plaintiff that the business was a steadily increasing business, and that it was a business of more than twelve sacks a week.

4. On the 5th of April, 1878, the plaintiff, believing the said statements of the defendant to be true, agreed to purchase the said premises from the defendant for 500*l.*, and paid to him a deposit of 200*l.* in respect of the purchase.

5. On the 15th April, the purchase was completed, an assignment of the lease executed, and the balance of the purchase money paid. On the same day the plaintiff entered into possession.

6. The plaintiff soon afterwards discovered that at the time of the negotiations for the said purchase by him and of the said agreement, and of the completion thereof, the said business was, and had long been, a declining business; and at each of those times, and for a long time before, it had never been a business of more than eight sacks a week. And the said premises were not of the value of 500*l.*, or of any saleable value whatever.

7. The defendant made the false representations hereinbefore mentioned well knowing them to be false, and fraudulently, with the intention of inducing the plaintiff to make the said purchase on the faith of them.

The plaintiff claims 600*l.* damages.

## FORM 4.

1878. B. No. 233.

In the High Court of Justice.  
Queen's Bench Division.

Between A.B. Plaintiff,  
and  
C.D. Defendant.

*Statement of Defence.*

1. The defendant says that at the time when he made the representations mentioned in the third paragraph of the statement of claim and throughout the whole of the transactions between the plaintiff and defendant, and down to the completion of the purchase and the relinquishment by the defendant of the said shop and business to the plaintiff, the said business was an increasing business, and was a business of over twelve sacks a week. And the defendant denies the allegations of the sixth paragraph of the statement of claim.

2. The defendant repeatedly during the negotiations told the plaintiff that he must not act upon any statement or representation of his, but must ascertain for himself the extent and value of the said business. And the defendant handed to the plaintiff for this purpose the whole of his books, showing fully and truthfully all the details of the said business, from which books the nature, extent, and value thereof could be fully seen, and those books were examined for that purpose by the plaintiff, and by an accountant on his behalf. And the plaintiff made the purchase in reliance upon his own judgment, and the result of his own inquiries and investigations, and not upon any statement or representation whatever of the defendant.

## FORM 5.

1878. B. No. 233.

In the High Court of Justice.  
Queen's Bench Division.

Between A.B. Plaintiff,  
and  
C.D. Defendant.

*Reply.*

The plaintiff joins issue upon the defendant's statement of defence.

## FORM 6.

*Notice of Trial.*

In the High Court of Justice.

Queen's Bench Division.

*A.B. v. C.D.*

Take notice of trial of this action by a Judge and a special jury in Middlesex, for the 1st day of March next.

*E.F.*, plaintiff's solicitor.

Dated 15th January, 1879.

To Z., defendant's solicitor.

## FORM 7.

*Notice to produce Documents.*

In the High Court of Justice.

Queen's Bench Division.

*A.B. v. C.D.*

Take notice that the plaintiff hereby requires you to produce and show to the Court and jury on the trial of this action all books, papers, letters, copies of letters, and all writings, and other documents in your custody, possession, or power, containing any entry, memorandum, or minute relating to the matters in question in the action, and particularly the books relating to the defendant's business as a baker in C. L. Street, and all letters written by the plaintiff to the defendant, also all letters written by the plaintiff's solicitor to the defendant's solicitor, and the notices to admit and produce in this action.

*E.F.*,

Plaintiff's solicitor.

Dated 18th January, 1879.

To Z., defendant's solicitor or agent.

## FORM 8.

*Notice to admit Documents.\**

In the High Court of Justice.

Queen's Bench Division.

*A.B. v. C.D.*

Take notice that the plaintiff in this cause proposes to adduce in evidence the several documents hereunder

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\* The notices to produce and to admit documents will in most cases be also given *mutatis mutandis* by the defendant to the plaintiff.

specified, and that the same may be inspected by the defendant, his solicitor or agent, at my office, at 14, K. B. W., Temple, London, on 21st January next, between the hours of eleven and two; and the defendant is hereby required, within forty-eight hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed, as they purport respectively to have been; that such as are specified as copies are true copies; and such documents as are stated to have been served, sent, or delivered, were so served, sent, or delivered respectively; saving all just exceptions to the admissibility of all such documents as evidence in this cause.

*E.F.*, solicitor for plaintiff.

Dated 18th January, 1879.

To *Z.*, solicitor for defendant.

#### ORIGINALS.

Description of Documents.	Dates.
Letter—Defendant to Plaintiff ... ..	24 March, 1878.
Letter—Defendant's Solicitor to Plaintiff's Solicitor ... ..	1 May, 1878.

#### COPIES.

Description of Documents.	Dates.	Original or Duplicate served, sent, or delivered, when, how, and by whom.
Letter— Plaintiff to Defendant ...	26 March, 1878.	Sent by General Post 26 March, 1878.

## FORM 9.

*Certificate of Officer after Trial by a Jury.*

13th February, 1879.

1878. B. No. 233.

In the High Court of Justice.  
Queen's Bench Division.

Between A.B. Plaintiff,  
and  
C.D. Defendant.

I certify that this action was tried before the Honourable Mr. Justice P. Q., and a special jury of the county of Middlesex, on the 12th and 13th days of February, 1879.

The jury found for the plaintiff with 400*l.* damages.

The Judge directed that judgment should be entered for the plaintiff for 400*l.* with costs of suit.

R.F., Associate.

## FORM 10.

*Judgment.*

15th February, 1879.

1878. B. No. 233.

In the High Court of Justice.  
Queen's Bench Division.

Between A.B. Plaintiff,  
and  
C.D. Defendant.

The action having on the 12th and 13th of February, 1879, been tried before the Honourable Mr. Justice P. Q. and a special jury of the county of Middlesex, and the jury having found for the plaintiff with 400*l.* damages, and the said Mr. Justice P. Q. having ordered that judgment be entered for the plaintiff for 400*l.* and costs of suit. Therefore it is adjudged that the plaintiff recover against the defendant 400*l.* and 50*l.* for his costs of suit.

## FORM 11.

1878. B. No. 233.

*Præcipe for Fieri Facias.*

In the High Court of Justice.

Queen's Bench Division.

Between *A.B.* Plaintiff,  
and  
*C.D.* Defendant.

Seal a writ of fieri facias directed to the sheriff of Middlesex to levy against *C.D.* of 8, U. V. Street, the sum of 400*l.* and interest thereon at the rate of 4*l.* per centum per annum from the 15th day of February, and 43*l.* 6*s.* 8*d.* costs.

Judgment dated 15th day of February, 1879.

Taxing master's certificate, dated 16th day of February, 1879.

*X.Y.*, solicitor for plaintiff.

## FORM 12.

*Writ of Fieri Facias.*

1879. B. No. 233.

In the High Court of Justice.

Queen's Bench Division.

Between *A.B.* Plaintiff,  
and  
*C.D.* Defendant.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.

To the Sheriff of Middlesex greeting.

We command you that of the goods and chattels of *C.D.* in your bailiwick you cause to be made the sum of 400*l.* and also interest thereon at the rate of 4*l.* per centum per annum from the 15th day of February, which said sum of money and interest were lately before us in our High Court of Justice in a certain action wherein *A.B.* is plaintiff and *C.D.* is defendant by a judgment of our said Court, bearing date the 15th day of February, adjudged to be paid by the said *C.D.* to *A.B.*, together with certain costs in the said judgment mentioned, and which costs have been taxed and allowed by one of the taxing masters of our said Court at the sum of 43*l.* 6*s.* 8*d.*, as appears by the certificate of



the said taxing master, dated the 16th day of February. And that of the goods and chattels of the said *C.D.* in your bailiwick you further cause to be made the said sum of 43*l.* 6*s.* 8*d.* together with interest thereon at the rate of 4*l.* per centum per annum from the 16th day of February, and that you have that money and interest before us in our said Court immediately after the execution hereof to be paid to the said *A.B.* in pursuance of the said judgment. And in what manner you shall have executed this our writ make appear to us in our said Court immediately after the execution thereof. And have there then this writ.

Witness, the Right Honourable Hugh MacCalmont Baron Cairns, Lord High Chancellor of Great Britain, at Westminster, this 26th day of February, one thousand eight hundred and seventy-nine.

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## II.

SPECIALLY INDORSED WRIT AND JUDGMENT  
BY DEFAULT IN A DISTRICT REGISTRY.

## FORM 13.

*Writ of Summons.*

1879. F. No. 102.

In the High Court of Justice.  
Exchequer Division.Between *E.F.* Plaintiff,  
and  
*G.H.* Defendant.Victoria, by the grace of God, of the United Kingdom of  
Great Britain and Ireland, Queen, Defender of the  
Faith.To *G.H.* of *R.* in the county of Northampton.

We command you, That within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the Exchequer Division of Our High Court of Justice in an action at the suit of *E.F.*; and take notice, that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence. Witness, The Right Honourable Hugh MacCalmont Baron Cairns, Lord High Chancellor of Great Britain, at Westminster, the 1st day of February, one thousand eight hundred and seventy-nine.

N.B.—This writ is to be served within twelve calendar months from the date thereof, or, if renewed, from the date of such renewal, including the day of such date, and not afterwards.

The defendant may appear hereto by entering an appearance, either personally or by solicitor at the District Registry Office, 25, W. Street, Northampton, or the Exchequer Office at Stone Buildings, Lincoln's Inn, in the county of Middlesex.

*Indorsements on writ made before issue.*

The plaintiff's claim is 64*l.* 15*s.* for the price of goods sold, and 1*l.* 8*s.* 4*d.* for costs ; and if the amount claimed be paid to the plaintiff or his solicitor within four days from the service hereof, further proceedings will be stayed.

The following are the particulars :—

	£	s.	d.
1876—31st Dec.			
Balance of account for butcher's meat to this date . . . . .	35	10	0
1877—1st January to 31st March.			
Butcher's meat supplied . . . . .	74	5	0
	109	15	0
1877—1st Feb., paid . . . . .	45	0	0
Balance due . . . . .	£64	15	0

The writ was issued by S.T., of 7, K. Street, Northampton, solicitor for the said plaintiff, who resides at 21, L. M. Street, Northampton.

*Indorsement made on the writ after service.*

This writ was served by A.W. on G.H. the defendant on Monday, the 3rd day of February, 1879.

(Signed)

A.W.

## FORM 14.

*Judgment by Default of Appearance.*

1879. F. No. 102.

In the High Court of Justice.

Exchequer Division.

Between E.F. Plaintiff,  
and  
G.H. Defendant.

28th February, 1879.

The defendant not having appeared to the writ of summons herein, it is this day adjudged that the plaintiff recover against the said defendant 64*l.* 15*s.*, and costs to be taxed.

## III.

## PLEADINGS IN AN ADMINISTRATION ACTION.

## FORM 15.

1879. B. No. 33.

In the High Court of Justice.

Chancery Division.

Master of the Rolls.

Writ issued 2nd February, 1879.

In the matter of the estate of *A.B.*, deceased.Between *E.F.* Plaintiff,

and

*G.H.* Defendant.*Statement of Claim.*

1. *A.B.* of *K.*, in the county of *L.*, died on the 1st of July, 1875, intestate. The defendant *G.H.* is the administrator of *A.B.*

2. *A.B.* died entitled to lands in the said county for an estate of fee simple, and also to some other real estate and to personal estate. The defendant has entered possession of the real estate of *A.B.*, and received the rents thereof. The legal estate in such real estate is outstanding in mortgages under mortgages created by the intestate.

3. *A.B.* was never married; he had one brother only, who pre-deceased him without having been married, and two sisters only, both of whom also pre-deceased him, namely *M.N.* and *P.Q.* The plaintiff is the only child of *M.N.*, and the defendant is the only child of *P.Q.*

The plaintiff claims—

1. To have the real and personal estate of *A.B.* administered in this court, and for that purpose to have all proper directions given and accounts taken.
2. To have a receiver appointed of the rents of his real estate.
3. Such further or other relief as the nature of the case may require.

## FORM 16.

1879. B. No. 33.

In the High Court of Justice.  
Chancery Division.

Master of the Rolls.

In the matter of the estate of *A.B.*, deceased.

Between *E.F.* Plaintiff,  
and  
*G.H.* Defendant.

*Statement of Defence.*

1. The plaintiff is an illegitimate child of *M.N.* She was never married.

2. The intestate was not entitled to any real estate at his death, except a copyhold estate situate in the county of *R.*, and held of the manor of *S.* According to the custom of that manor, when the copyholder dies without issue, and without leaving a brother, or issue of a deceased brother, the copyhold descends to his elder sister and her issue in preference to his younger sister and her issue. *P.Q.* was older than *M.N.*

3. The personal estate of *A.B.* was not sufficient for the payment of his debts, and has all been applied in payment of his funeral and testamentary expenses, and part of his debts.

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FORM 17.

*Demurrer.*

1879. B. No. 33.

In the High Court of Justice.  
Chancery Division.

Master of the Rolls.

*A.B. v. C.D.*

The defendant demurs to the plaintiff's statement of claim, and says that the same is bad in law on the ground that the heir of the said *A.B.* is not a party to the action, and on other grounds, sufficient in law to sustain this demurrer.

## FORM 18.

1879. B. No. 33.

In the High Court of Justice,  
Chancery Division.

Master of the Rolls.

In the matter of the estate of *A.B.*, deceased.

Between *E.F.* Plaintiff,  
and  
*G.H.* Defendant.

*Reply.*

The plaintiff joins issue with the defendant upon his defence.

## FORM 19.

*Judgment at Trial by Judge without a Jury.*

1879. B. No. 33.

In the High Court of Justice.  
Chancery Division.

Master of the Rolls.

7th day of March, 1879.

In the matter of the estate of *A.B.*, deceased.

Between *E.F.* Plaintiff,  
and  
*G.H.* Defendant.

This action coming on for trial the 1st day of March, before the Right Hon. Sir G. Jessel, Master of the Rolls, in the presence of counsel for the plaintiff and the defendant, upon hearing the probate of the will of *A.B.*, the answer of the defendant *E.F.* to interrogatories, the admission in writing, dated 5th of February, and signed by Mr. *H.Y.*, the solicitor for the plaintiff, and by Mr. *P.Q.*, the solicitor for the defendant, the affidavits of *E.F.*, *R.S.*, and *T.U.*, filed the 5th day of February, the affidavit of *G.H.*, *O.V.* and *O.P.*, filed the 5th day of February, the evidence of *K.L.* and *M.N.*, taken on their oral examination at the trial, and an exhibit marked *X.*, being an indenture dated, &c., and made between, &c., and what was alleged by counsel on both sides : This court doth declare, &c.

And this Court doth order and adjudge, &c.

## IV.

## PLEADINGS IN A PROBATE ACTION.

## FORM 20.

1878. B. No. 99.

In the High Court of Justice.

Probate, Divorce and Admiralty Division.

Writ issued, 12th March, 1878.

Between A.B. Plaintiff,  
and  
E.F. Defendant.

*Statement of Claim.*

1. C. T., late of Bicester, in the county of Oxford, gentleman, deceased, who died on the 20th of January, 1878, at Bicester, being of the age of 21 years, made his last will, with one codicil thereto, the said will bearing date the first day of October, 1874, and the said codicil the first of January, 1875, and in the said will appointed the plaintiff sole executor thereof.

2. The said will and codicil were signed by the deceased in the presence of two witnesses present at the same time, the said will in the presence of H.P. and J.R., and the said codicil in the presence of J.D. and G.E., and who subscribed the same in the presence of the said deceased.

3. The deceased was at the time of the execution of the said will and codicil respectively of sound mind, memory and understanding.

The plaintiff claims :

That the Court shall decree probate of the said will and codicil in solemn form of law.

## FORM 21.

1878. B. No. 99.

In the High Court of Justice.

Probate, Divorce and Admiralty Division.

Between *A.B.* Plaintiff,  
and  
*C.D.* Defendant.

*Statement of Defence.*

The defendant says as follows :

1. The said will and codicil of the said deceased were not duly executed according to the provisions of the statute 1 Vict. c. 26.

2. The deceased at the time the said will and codicil respectively purport to have been executed was not of sound mind, memory and understanding.

3. The execution of the said will and codicil was obtained by the undue influence of the plaintiff [and others acting with him, whose names are at present unknown to the defendant.]

4. The execution of the said will and codicil was obtained by the fraud of the plaintiff, such fraud, so far as is within the defendant's present knowledge being [*state the nature of the fraud.*]

5. The said deceased at the time of the execution of the said will and codicil did not know and approve of the contents thereof, or of the contents of the residuary clause in the said will [*as the case may be.*]

6. The deceased made his true last will, dated the 1st day of January, 1873, and in the said will appointed the defendant sole executor thereof. [*Propound this will as in paragraphs 2 and 3 of claim.*]

The defendant claims :

1. That the Court will pronounce against the said will and codicil propounded by the plaintiff :
  2. That the Court will decree probate of the said will of the said deceased, dated the 1st of January, 1873, in solemn form of law.
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FORM 22.

1878. B. No. 99.

In the High Court of Justice.

Probate, Divorce and Admiralty Division.

Between *A.B.* Plaintiff,  
and  
*C.D.* Defendant.

*Reply.*

1. The plaintiff joins issue upon the statement of defence of the defendant, as contained in the first, second, third, fourth and fifth paragraphs thereof.

2. The plaintiff says that the said will of the said deceased, dated the 1st of January, 1873, was duly revoked by the will of the said 1st of October, 1874, propounded by the plaintiff in his statement of claim.

## V.

WARRANT AND PLEADINGS IN AN ADMIRALTY  
ACTION IN REM.

## FORM 23.

*Warrant of Arrest.*

1878. B. No. 88.

In the High Court of Justice.

Probate, Divorce and Admiralty Division.

Between *A.B.* and *C.D.*, Plaintiffs,  
andThe Owners of the "*American*."Victoria, by the grace of God, of the United Kingdom  
of Great Britain and Ireland, Queen, Defender of the  
Faith.To the Marshal of the Probate, Divorce and Admiralty  
Division of our High Court of Justice, and to all and  
singular his substitutes.We hereby command you to arrest the ship or vessel,  
"*American*," of the port of Liverpool, and the cargo laden  
therein, and to keep the same under safe arrest until you  
shall receive further orders from Us. Witness the Right  
Honourable Hugh MacCalmont Baron Cairns, Lord High  
Chancellor of Great Britain, this 7th day of May, 1878.

## FORM 24.

1878. B. No. 88.

In the High Court of Justice.

Probate, Divorce and Admiralty Division.

Writ issued 1st May, 1878.

THE "*AMERICAN*."Between *A.B.* and *C.D.*, Plaintiffs,  
and  
*E.F.* and *G.H.* Defendants.*Statement of Claim.*1. Shortly before 8 a.m. on the 9th of December, 1876,  
the brigantine "*Katie*," of 194 tons register, of which the

plaintiffs were owners, manned by a crew of eight hands all told, whilst on a voyage from Dublin to St. John's, Newfoundland, in ballast, was in latitude about  $46^{\circ}$  N., and longitude  $40^{\circ} 42'$  W., by account.

2. The wind at such time was about W. by S., a strong breeze, and the weather was clear, and the "Katie" was under double-reefed mainsail, reefed mainstaysail, middle staysail, lower topsail, reefed fore staysail, and jib, sailing full and by on the port tack, heading about N.W.  $\frac{1}{2}$  N., and proceeding at the rate of about five knots and a-half per hour.

3. At such time a steamship under steam and sail, which proved to be the screw steamship "American," was seen at the distance of three or four miles from the "Katie," broad on her port bow, and steering about E. or E. by S. The master of the "Katie" not having been able to take observations for several days, and her chronometer having run down, and the said master wishing to exchange longitudes with the "American," caused an ensign to be hoisted, and marked his longitude by account on a board which he exhibited over the port side. The "Katie" was kept full and by, and the "American" approached rapidly, and attempted to pass ahead of the "Katie," and caused immediate danger of collision, and although thereupon the helm of the "Katie" was put hard a-port and her mainsheet let go, the "American" with her stem struck the "Katie" on her port side, almost amidships, cutting her nearly in two, and the "Katie" sank almost immediately, her crew being saved by the steamer.

4 The "American" improperly neglected to keep clear of the "Katie."

5. The "American" improperly attempted to pass ahead of the "Katie."

6. The "American" improperly neglected to ease her engines, and improperly neglected to stop and reverse her engines in due time.

The plaintiffs claim :—

1. That it may be declared that the plaintiffs are entitled to the damage proceeded for :
2. That the bail given by the defendants be condemned in such damage, and in costs :
3. That the accounts and vouchers relating to such damage be referred to the Registrar assisted by merchants to report the amount thereof :
4. Such further and other relief as the nature of the case may require.

## FORM 25.

1878. B. No. 88.

In the High Court of Justice.

Probate, Divorce and Admiralty Division.

## THE "AMERICAN."

Between A.B. and C.D. Plaintiffs,  
and  
E.F. and G.H. Defendants.

*Statement of Defence.*

The defendants say as follows :—

1. The "American" is a screw steamship, of 1368 tons register, with engines of 200-horse power nominal, belonging to the port of Liverpool, and at the time of the occurrences hereinafter mentioned was manned by a crew of 40 hands all told, laden with a cargo of general merchandise, and bound from Port-au-Prince in the West Indies to Liverpool.

2. About 8.5 a.m. on the 28th of November, 1876, the "American" was in latitude 46° N., longitude 38° 16' W., steering E. by S. true magnetic, making under all sail and steam about 12 knots an hour, the wind being about S.W. by S. true magnetic, blowing a strong breeze, and the weather hazy, when a vessel, which afterwards proved to be the brigantine "Katie," was observed on the "American's" starboard bow about four miles distant, bearing about S.E. by E. true magnetic, close-hauled to the wind, and steering a course nearly parallel to that of the "American."

3. The "American" kept her course, and when the "Katie" was about three miles distant her ensign was observed by those on board the "American" run up to the main, and she was seen to have altered her course, and to be bearing down towards the "American." The "American's" ensign was afterwards run up, and her master supposing that the "Katie" wanted to correct her longitude, or to speak the "American," continued on his course expecting that the "Katie," when she had got sufficiently close to speak or show her black board over her starboard side, would luff to the wind, and pass to the windward of the "American."

4. The master of the "American" watched the "Katie" as she continued to approach the "American," and when she had approached as near as he deemed it prudent for her to come, he waved to her to luff, and shortly afterwards on his observing her to be attempting to cross the bows of

the "American," the helm of the latter was immediately put to starboard, and engines stopped and reversed full speed; but notwithstanding, the "American" with her stem came into collision with the port side of the "Katie," a little forward of the main rigging.

5. The "American's" engines were then stopped, and when the crew of the "Katie" had got on board of the "American," the latter's engines were reversed to get her clear of the "Katie," which sunk under the "American's" bows.

6. The "Katie" improperly approached too close to the "American."

7. Those on board the "Katie" improperly neglected to luff, and to pass to windward of the "American."

8. Those on board the "Katie" improperly attempted to cross the bows of the "American."

9. Those on board the "Katie" improperly ported her helm before the said collision.

10. Those on board the "Katie" improperly neglected to starboard her helm before the said collision.

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FORM 26.

1878. B. No. 88.

In the High Court of Justice.

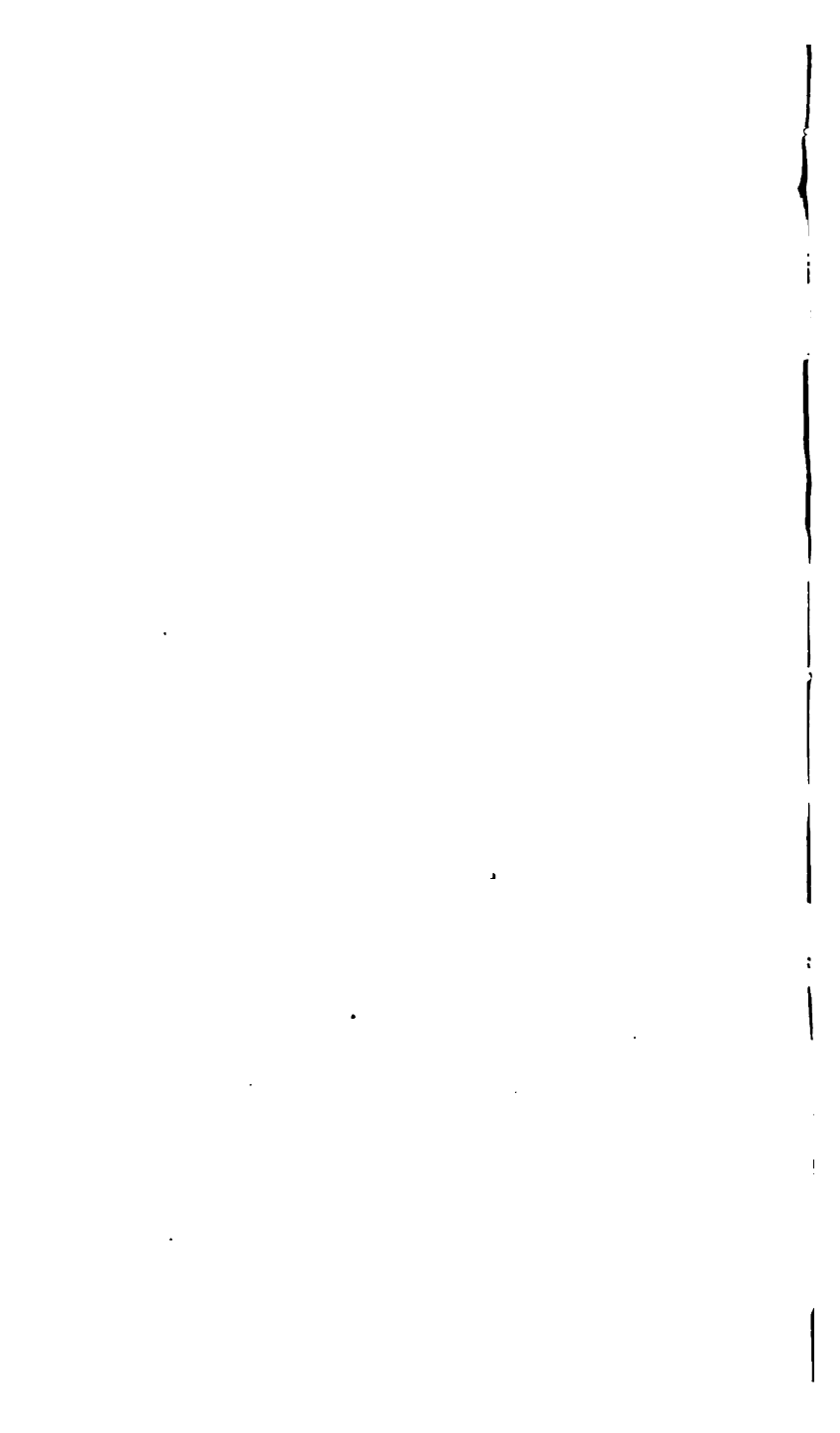
Probate, Divorce and Admiralty Division.

THE "AMERICAN."

Between *A.B.* and *C.D.* Plaintiffs,  
*E.F.* and *G.H.* and Defendants.

*Reply.*

The plaintiffs join issue upon the defendants' statement of defence.



## THE RULES OF THE SUPREME COURT.\*

[NOTE.—Where no other provision is made by the Act or these Rules the present Procedure and Practice remain in force.]

### ORDER I.

#### FORM AND COMMENCEMENT OF ACTION.

1. All actions which have hitherto been commenced by writ in the superior courts of common law at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Pleas at Durham, and all suits which have hitherto been commenced by bill or information in the High Court of Chancery, or by a cause in rem or in personam in the High Court of Admiralty, or by citation or otherwise in the Court of Probate, shall be instituted in the High Court of Justice by a proceeding to be called an action. Action defined.†

2. With respect to interpleader, the procedure and Interpleader.

\* The basis of these Rules consists of the "Rules of Court" contained in the first schedule to the Judicature Act of 1875. The "Rules of Court" have been supplemented by the "Rules of the Supreme Court, December, 1875," "February, 1876," "June, 1876," "December, 1876," "May, 1877," "June, 1877," "November, 1878," and "March, 1879;" and the "Rules of the Supreme Court," which is the collective name of the Code of Procedure of the Supreme Court, as amended from time to time, are subject to additions and alterations, under sect. 17 of the Judicature Act, 1875.

† The marginal notes are taken, by permission, from "Lely and Foulkes' Judicature Acts" (2nd edition).

practice now used by courts of common law under the Interpleader Acts, 1 & 2 Will. 4, c. 58, and 23 & 24 Vict. c. 126, shall apply to all actions and all the divisions of the High Court of Justice, and the application by a defendant shall be made at any time after being served with a writ of summons and before delivering a defence.

Proceedings  
other than  
actions and  
inter-  
pleader.

3. All other proceedings in and applications to the High Court may, subject to these rules, be taken and made in the same manner as they would have been taken and made in any court in which any proceeding or application of the like kind could have been taken or made if the act had not been passed.

## ORDER II.

### WRIT OF SUMMONS AND PROCEDURE, &c.

Commence-  
ment of  
actions by  
writ.

1. Every action in the High Court shall be commenced by a writ of summons, which shall be indorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action, and which shall specify the division of the High Court to which it is intended that the action should be assigned.

Costs by use  
of prolix  
forms.

2. Any costs occasioned by the use of any more prolix or other forms of writs, and of indorsements thereon, than the forms hereinafter prescribed, shall be borne by the party using the same, unless the court shall otherwise direct.

Form of  
writ.

3. The writ of summons for the commencement of an action shall, except in the cases in which any different form is hereinafter provided, be in Form No. 1 in Part I. of Appendix (A.)\* hereto, with such variations as circumstances may require.

Amended  
form.

3A. Forms 2 and 3 in Part I. of Appendix (A.) to the Rules of the Supreme Court shall be read as if the words "by leave of the court or a judge" were not therein.

Writ for  
service out  
of jurisdic-  
tion by  
leave.

4. No writ of summons for service out of the jurisdiction, or of which notice is to be given out of the jurisdiction, shall be issued without the leave of a court or judge.

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\* See p. 227. The form of writ for service abroad is substantially the same.



5. A writ of summons to be served out of the jurisdiction, or of which notice is to be given out of the jurisdiction, shall be in Form No. 2 in Part I. of Appendix (A.) hereto, with such variations as circumstances may require. Such notice shall be in Form No. 2, in the same part, with such variations as circumstances may require.

Form of writ for service abroad.

6. With respect to actions upon a bill of exchange or promissory note, commenced within six months after the same shall have become due and payable, the procedure under the Bills of Exchange Act, 18 & 19 Vict. c. 67, shall continue to be used.\*

Bills of exchange.

7. The writ of summons in every Admiralty action in rem shall be in Form No. 4 of Part I. of Appendix (A.) hereto, with such variations as circumstances may require.

Form of Admiralty writ.

7A. Form (A.) in the Appendix to these Rules shall be substituted for the form referred to in Order II., Rule 7, of the Rules of the Supreme Court.

Substituted form.

8. Every writ of summons, and also every other writ, shall bear date on the day on which the same shall be issued, and shall be tested in the name of the Lord Chancellor, or if the office of Lord Chancellor shall be vacant, in the name of the Lord Chief Justice of England.

Date, &c., of writ.

### ORDER III.

#### INDORSEMENTS OF CLAIM.

1. The indorsement of claim shall be made on every writ of summons before it is issued.

Time of indorsement.

2. In the indorsement required by Order II., Rule 1, it shall not be essential to set forth the precise ground of complaint, or the precise remedy or relief to which the plaintiff considers himself en-

Contents of indorsement.

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\* The Bills of Exchange Act must be strictly followed, so that proof of service on a partnership as now allowed by these rules (Ord. ix. 6), instead of personal service, as required by the Bills of Exchange Act, does not entitle the plaintiff to enter judgment (*Pollock v. Campbell*, 45 L. J. Ex. 199; L. R. 1 Ex. D. 50); but a writ under the Bills of Exchange Act may issue from a district registry (*Oger v. Bradnum*, 45 L. J. C. P. 273; L. R. 1 C. P. D. 334).

titled. The plaintiff may by leave of the Court or judge amend such indorsement so as to extend it to any other cause of action or any additional remedy or relief.

Forms of  
indorse-  
ment.

3. The indorsement of claim may be to the effect of such of the Forms in Part II.\* of Appendix (A.) hereto as shall be applicable to the case, or if none be found applicable, then such other similarly concise form as the nature of the case may require.

Indorsing  
representa-  
tive  
capacity.

4. If the plaintiff sues or the defendant or any of the defendants is sued in a representative capacity, the indorsement shall show, in manner appearing by the statement in Appendix (A.) hereto, Part II., Sect. 8, or by any other statement to the like effect, in what capacity the plaintiff or defendant sues or is sued.

Indorse-  
ment in  
Probate  
actions.

5. In Probate actions the indorsement shall show whether the plaintiff claims as creditor, executor, administrator, residuary legatee, legatee, next of kin, heir-at-law, devisee, or in any and what other character.

Special in-  
dorsement  
of debt or  
liquidated  
demand.

6. In all actions where the plaintiff seeks merely to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising upon a contract, express or implied, as, for instance, on a bill of exchange, promissory note, cheque, or other simple contract debt, or on a bond or contract under seal for payment of a liquidated amount of money, or on a statute where the sum sought to be recovered is a fixed sum of money or in the nature of a debt, or on a guaranty, whether under seal or not, where the claim against the principal is in respect of such debt or liquidated demand, bill, cheque, or note, or on a trust, the writ of summons may be specially indorsed with the particulars of the amount sought to be recovered, after giving credit for any payment or set-off.

General in-  
dorsement  
of debt and  
costs.

7. Wherever the plaintiff's claim is for a debt or liquidated demand only, the indorsement, beside stating the nature of the claim, shall state the amount claimed for debt, or in respect of such demand, and for costs respectively, and shall further state, that upon payment thereof within four days after service, or in case of a writ not for service within the jurisdiction within the time allowed for appearance, further proceedings will be stayed. Such statement

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\* See p. 228.

may be in the form in Appendix (A.) hereto, Part II., Sect. 3.\* The defendant may, notwithstanding such payment, have the costs taxed, and if more than one-sixth shall be disallowed, the plaintiff's solicitor shall pay the costs of taxation.

8. In all cases of ordinary account, as, for instance, in the case of a partnership or executorship, or ordinary trust account, where the plaintiff, in the first instance, desires to have an account taken, the writ of summons shall be indorsed with a claim that such account be taken.

Indorsement of claim for account.

#### ORDER IV.

##### INDORSEMENT OF ADDRESS.

1. The solicitor of a plaintiff suing by a solicitor shall indorse upon every writ of summons, and notice in lieu of service of a writ of summons, the address of the plaintiff, and also his own name or firm and place of business, and also, if his place of business shall be more than three miles from Temple Bar, another proper place, to be called his address for service, which shall not be more than three miles from Temple Bar, where writs, notices, petitions, orders, summonses, warrants, and other documents, proceedings, and written communications may be left for him. And where any such solicitor is only agent of another solicitor, he shall add to his own name or firm and place of business the name or firm and place of business of the principal solicitor.

Where plaintiff sues by solicitor.

Agency.

2. A plaintiff suing in person shall indorse upon every writ of summons, and notice in lieu of service of a writ of summons, his place of residence and occupation, and also, if his place of residence shall be more than three miles from Temple Bar, another proper place, to be called his address for service, which shall not be more than three miles from Temple Bar, where writs, notices, petitions, orders, summonses, warrants, and other documents, proceedings, and written communications may be left for him.

Where plaintiff sues in person.

*[The above two rules are to apply to all cases in which the writ of summons is issued out of the London office.]*

2A. Notwithstanding anything to the contrary

\* See p. 237.

Town writs,  
indorse-  
ment of.

contained in Order IV. of the Rules of the Supreme Court, Rules 1 and 2 of such Order shall only apply when the writ of summons is issued out of the London office.

Where  
writ out of  
district  
registry.

3. In all cases where a writ of summons is issued out of a district registry the solicitor shall give on the writ the address of the plaintiff, and his own name or firm and his place of business, which shall, if his place of business be within the district of the registry, be an address for service, and if each place be not within the district he shall add an address for service within the district, and, where the defendant does not reside within the district, he shall add a further address for service, which shall not be more than three miles from Temple Bar; and where the solicitor issuing the writ is only agent of another solicitor, he shall add to his own name or firm and place of business the name or firm and place of business of the principal solicitor. Where the plaintiff sues in person, he shall give on the writ his place of residence and occupation, which shall, if his place of residence be within the district, be an address for service, and if such place be not within the district he shall add an address for service within the district, and, where the defendant does not reside within the district, he shall add a further address for service, which shall not be more than three miles from Temple Bar.

#### ORDER V.

##### ISSUE OF WRITS OF SUMMONS.

###### 1. *Place of Issue.*

When out of  
district  
registry.

1. In any action other than a Probate action, the plaintiff wherever resident may issue a writ of summons out of the registry of any district.

What writ  
must state  
if defendant  
not resident  
within  
district.

2. In all cases where a defendant neither resides nor carries on business within the district out of the registry whereof a writ of summons is issued, there shall be a statement on the face of the writ of summons that such defendant may cause an appearance to be entered at his option either at the district registry or the London office, or a statement to the like effect.

What if  
defendant  
resident.

3. In all cases where a defendant resides or carries on business within the district, and a writ of summons is issued out of the district registry, there shall

be a statement on the face of the writ of summons, that the defendant do cause an appearance to be entered at the district registry, or to the like effect.

2. *Option to choose Division in certain Cases.*

4. Subject to the power of transfer, every person by whom any cause or matter may be commenced in the High Court of Justice which would have been within the non-exclusive cognizance of the High Court of Admiralty if the said Act had not passed shall assign such cause or matter to any one of the divisions of the said High Court, including the Probate, Divorce and Admiralty Division, as he may think fit, by marking the document by which the same is commenced with the name of the division, and giving notice thereof to the proper officer of the court. If so marked for the Chancery Division the same shall be assigned to one of the judges of such division by marking the same with the name of such of the said judges as the plaintiff or petitioner (subject to such power of transfer) may think fit.

Choice of division in Admiralty actions.

4A. Subject to the power of transfer and subject also to the power of the Lord Chancellor, by order from time to time otherwise to direct, every cause or matter which shall be commenced in the Chancery Division of the High Court, shall be assigned to one of the judges thereof by marking the same with the name of such of the same judges as the plaintiff or petitioner may in his option think fit.

Assigning to judge of Chancery Division.

4A.\* If, in any action commenced and pending in any one of the Queen's Bench, Common Pleas, or Exchequer Divisions of the High Court the trial shall take place before a judge of another of the said Divisions, the cause shall from that time be transferred to the Division of which such judge is a member.

3. *Generally.*

5. Writs of summons shall be prepared by the plaintiff or his solicitor, and shall be written or printed, or partly written and partly printed, on paper of the same description as hereby directed in the case of proceedings directed to be printed.

Preparation of writs.

6. Every writ of summons shall be sealed by the proper officer, and shall thereupon be deemed to be issued.

Seal of writ.

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\* So numbered in duplicate.

Copy of writ left in office.

7. The plaintiff or his solicitor shall, on presenting any writ of summons for sealing, leave with the officer a copy, written or printed, or partly written and partly printed, on paper of the description aforesaid, of such writ, and all the indorsements thereon, and such copy shall be signed by or for the solicitor leaving the same, or by the plaintiff himself if he sues in person.

Entry in cause book.

8. The officer receiving such copy shall file the same, and an entry of the filing thereof shall be made in a book to be called the cause book, which is to be kept in the manner in which cause books have heretofore been kept by the clerks of records and writs in the Court of Chancery, and the actions shall be distinguished by the date of the year, a letter, and a number, in the manner in which causes are now distinguished in such last-mentioned cause books. And when such action shall be commenced in a district registry, it shall further be distinguished by the name of such registry.

Notice to officer of assignment of action.

9. Notice to the proper officer of the assignment of an action to any division of the court under sect. 11 of the Supreme Court of Judicature Act, 1875, or under Rule 4 of this Order, shall be sufficiently given by leaving with him the copy of the writ of summons.

#### 4. *In particular Actions.*

Affidavit before Probate writ.

10. The issue of a writ of summons in Probate actions shall be preceded by the filing of an affidavit made by the plaintiff or one of the plaintiffs in verification of the indorsement on the writ.

Before Admiralty writ.

11. In Admiralty actions in rem a warrant for the arrest of property according to Form (A.) in the Appendix to these Rules may be issued at the instance either of the plaintiff or of the defendant at any time after the writ of summons has issued; but no warrant of arrest shall be issued until an affidavit by the party or his agent has been filed, and the following provisions complied with:

Contents of affidavit.

(a) The affidavit shall state the name and description of the party on whose behalf the action is instituted, the nature of the claim, the name and nature of the property to be arrested, and that the claim has not been satisfied.

Wages.

(b) In an action of wages the affidavit shall

state the national character of the vessel proceeded against; and if against a foreign vessel, that notice of the institution of the action has been given to the consul of the State to which the vessel belongs, if there be one resident in London [*a copy of the notice shall be annexed to the affidavit*].

(c) In an action of bottomry, the bottomry Bottomry. bond, and if in a foreign language also a notarial translation thereof, shall be produced for the inspection and perusal of the registrar, and a copy of the bond, or of the translation thereof, certified to be correct, shall be annexed to the affidavit.

(d) In an action of distribution of salvage the Salvage. affidavit shall state the amount of salvage money awarded or agreed to be accepted, and the name, address, and description of the party holding the same.

(e) The Court or judge may in any case, if he Dispensing with particulars by judge. think fit, allow the writ of summons to issue although the affidavit may not contain all the required particulars. In a wages cause he may also waive the service of the notice, and in a cause of bottomry the production of the bond.

## ORDER VI.

### CONCURRENT WRITS.

1. The plaintiff in any action may, at the time of Issue of concurrent writ within twelve months. or at any time during twelve months after the issuing of the original writ of summons, issue one or more concurrent writ or writs, each concurrent writ to bear teste of the same day as the original writ, and to be marked with a seal bearing the word "concurrent," and the date of issuing the concurrent writ; and such seal shall be impressed upon the writ by the proper officer: provided always, that such concurrent writ or writs shall only be in force for the period during which the original writ in such action shall be in force.

2. A writ for service within the jurisdiction may be issued and marked as a concurrent writ with one for service, or whereof notice in lieu of service is to be given, out of the jurisdiction; and a writ for service, or whereof notice in lieu of service is to be Service out of jurisdiction.

given, out of the jurisdiction, may be issued and marked as a concurrent writ with one for service within the jurisdiction.

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### ORDER VII.

#### DISCLOSURE BY SOLICITORS AND PLAINTIFFS.

Declaration  
by solicitor  
whether  
writ issued  
with his  
authority.

1. Every solicitor whose name shall be indorsed on any writ of summons shall, on demand in writing made by or on behalf of any defendant who has been served therewith or has appeared thereto, declare forthwith whether such writ has been issued by him or with his authority or privity; and if such solicitor shall declare that the writ was not issued by him or with his authority or privity, all proceedings upon the same shall be stayed, and no further proceedings shall be taken thereupon without leave of the Court or a judge.

Declaration  
by partners  
of names of  
firm.

2. When a writ is sued out by partners in the name of their firm, the plaintiffs or their solicitors shall, on demand in writing by or on behalf of any defendant, declare forthwith the names and places of residence of all the persons constituting the firm. And if the plaintiffs or their solicitor shall fail to comply with such demand, all proceedings in the action may, upon an application for that purpose, be stayed upon such terms as the Court or a judge may direct. And when the names of the partners are so declared, the action shall proceed in the same manner and the same consequences in all respects shall follow as if they had been named as the plaintiffs in the writ. But all proceedings shall, nevertheless, continue in the name of the firm.

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### ORDER VIII.

#### RENEWAL OF WRIT.

Writ to be  
in force for  
twelve  
months  
only.

1. No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the ex-



piration of the twelve months,\* apply to a judge, or the district registrar, for leave to renew the writ; and the judge or registrar, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original or concurrent writ of summons be renewed for six months from the date of such renewal, and so from time to time during the currency of the renewed writ. And the writ shall in such case be renewed by being marked with a seal bearing the date of the day, month, and year of such renewal;† such seal to be provided and kept for that purpose at the proper office, and to be impressed upon the writ by the proper officer, upon delivery to him by the plaintiff or his solicitor of a memorandum in Form No. 5 in Appendix (A.) Part I.; and a writ of summons so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons.

Renewal of writ for six months by order of judge or district registrar.

2. The production of a writ of summons purporting to be marked with the seal of the Court, showing the same to have been renewed in manner aforesaid, shall be sufficient evidence of its having been so renewed, and of the commencement of the action as of the first date of such renewed writ for all purposes.

Evidence of renewal.

## ORDER IX.

### SERVICE OF WRIT OF SUMMONS.

#### 1. *Mode of Service.*

1. No service of writ shall be required when the

Accepting service.

\* If the twelve months have elapsed there is no power, under O.LVII.6, to enlarge the time for applying to renew the writ, when meanwhile the Statute of Limitation has expired. (*Doyle v. Kaufman*, 47 L. J. Q. B. 26; L. R. 3 Q. B. D. 7.)

† If the original writ be lost, the Court will not, to save the Statutes of Limitation, order a copy to be sealed by way of renewal. (*Davis v. Garland*, 45 L. J. Q. B. 137; L. R. 1 Q. B. D. 250.)

defendant, by his solicitor, agrees to accept service and enters an appearance.

Personal  
and sub-  
stituted  
service.

2. When service is required the writ shall, wherever it is practicable, be served in the manner in which personal service is now made, but if it be made to appear to the Court or to a judge that the plaintiff is from any cause unable to effect prompt personal service, the Court or judge may make such order for substituted or other service, or for the substitution of notice for service, as may seem just.

### 2. *On particular Defendants.*

Service on  
husband  
and wife.

3. When husband and wife are both defendants to the action, service on the husband shall be deemed good service on the wife, but the Court or a judge may order that the wife shall be served with or without service on the husband.

On infant.

4. When an infant is a defendant to the action, service on his or her father or guardian, or if none, then upon the person with whom the infant resides or under whose care he or she is, shall, unless the Court or judge otherwise orders, be deemed good service on the infant; provided that the Court or judge may order that service made or to be made on the infant shall be deemed good service.

On lunatic.

5. When a lunatic or person of unsound mind not so found by inquisition is a defendant to the action, service on the committee of the lunatic, or on the person with whom the person of unsound mind resides or under whose care he or she is, shall, unless the Court or judge otherwise orders, be deemed good service on such defendant.

### 3. *On Partners and other Bodies.*

On partners.

6. Where partners are sued in the name of their firm, the writ shall be served either upon any one or more of the partners or at the principal place within the jurisdiction of the business of the partnership upon any person having at the time of service the control or management of the partnership business there; and, subject to the rules hereinafter contained, such service shall be deemed good service upon the firm.

On person  
trading as  
firm.

6A. Where one person carrying on business in the name of a firm, apparently consisting of more than

one person, shall be sued in the firm name, the writ may be served at the principal place within the jurisdiction of the business so carried on, upon any person having at the time of service the control or management of the business there; and subject to any of the Rules of the Supreme Court, such service shall be deemed good service on the person so sued.

7. Whenever, by any statute, provision is made for service of any writ of summons, bill, petition, or other process upon any corporation, or upon any hundred, or the inhabitants of any place, or any society or fellowship, or any body or number of persons, whether corporate or otherwise, every writ of summons may be served in the manner so provided.

On corporation.

#### 4. *In particular Actions.*

8. Service of a writ of summons in an action to recover land may, in case of vacant possession, when it cannot otherwise be effected, be made by posting a copy of the writ upon the door of the dwelling-house or other conspicuous part of the property.

Service in action for recovery of land.

9. In Admiralty actions in rem, the warrant of arrest shall be served by the Marshal or his substitutes, whether the property to be arrested be situate within the port of London or elsewhere within the jurisdiction of the Court, and the solicitor issuing the warrant shall, within six days from the service thereof, file the same in the registry.

Service of warrant of arrest.

10. In Admiralty actions in rem, service of a writ of summons against ship, freight or cargo on board, is to be effected by nailing or affixing the original writ for a short time on the mainmast, or on the single mast of the vessel, and on taking off the process, leaving a true copy of it nailed or fixed in its place.

Service of Admiralty writ.

11. If the cargo has been landed or transhipped, service of the writ of summons to arrest the cargo and freight shall be effected by placing the writ for a short time on the cargo, and on taking off the process by leaving a true copy upon it.

Placing writ on cargo transhipped.

12. If the cargo be in the custody of a person who will not permit access to it, service of the writ may be made upon the custodian.

Service on custodian of cargo.

#### 5. *Generally.*

13. The person serving a writ of summons shall,

Indorse-  
ment of date  
of service

within three days at most after such service, indorse on the writ the day of the month and week of the service thereof, otherwise the plaintiff shall not be at liberty, in case of non-appearance, to proceed by default; and every affidavit of service of such writ shall mention the day on which such indorsement was made.

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### ORDER X.

#### SUBSTITUTED SERVICE.

Affidavit for  
substituted  
service.

Every application to the Court or a judge, under Order IX. Rule 2, for an order for substituted or other service, or for the substitution of notice for service, shall be supported by an affidavit setting forth the grounds upon which the application is made.

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### ORDER XI.

#### SERVICE OUT OF THE JURISDICTION.

When ser-  
vice out of  
the juris-  
diction may  
be allowed.

1. Service out of the jurisdiction of a writ of summons or notice of a writ of summons\* may be allowed by the Court or a judge whenever the whole or any part of the subject-matter of the action is land or stock, or other property situate within the jurisdiction, or any act, deed, will, or thing affecting such land, stock, or property, and whenever the contract which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any such action, or for the breach whereof damages or other relief are or is demanded in such action, was made or entered into within the jurisdiction, and whenever there has been a breach within the jurisdiction of any contract wherever made, and whenever any act or thing sought to be restrained, or removed, or for which damages are sought to be recovered, was or is to be done or is situate within the jurisdiction.

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\* A British subject is served with a writ and a foreigner with a notice. (*Beddington v. Beddington*, 45 L. J. Prob. 44; L. R. 1 Pr. D. 426.) A foreign corporation may now be served with a notice of a writ of summons. (*Westman v. Aktiebolaget*, 45 L. J. Ex. 327; L. R. 1 Ex. D: 237.)

1A. Whenever any action is brought in respect of any contract which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any such action, or for the breach whereof damages or other relief are or is demanded in such action when such contract was made or entered into within the jurisdiction, or whenever there has been a breach within the jurisdiction of any contract, wherever made, the judge, in exercising his discretion as to granting leave to serve such writ or notice on a defendant out of the jurisdiction, shall have regard to the amount or value of the property in dispute or sought to be recovered, and to the existence in the place of residence of the defendant, if resident in Scotland or Ireland, of a local Court of limited jurisdiction, having jurisdiction in the matter in question, and to the comparative cost and convenience of proceeding in England or in the place of such defendant's residence, and in all the above-mentioned cases no such leave is to be granted without an affidavit stating the particulars necessary for enabling the judge to exercise his discretion in manner aforesaid, and all such other particulars (if any) as he may require to be shown.

Exercise of discretion in giving leave.

2. In probate actions service of a writ of summons or notice of a writ of summons may by leave of the Court or judge be allowed out of the jurisdiction.

In probate actions.

3. Every application for an order for leave to serve such writ or notice on a defendant out of the jurisdiction shall be supported by evidence, by affidavit, or otherwise, showing in what place or country such defendant is or probably may be found, and whether such defendant is a British subject or not, and the grounds upon which the application is made.

Evidence in support of order.

4. Any order giving leave to effect such service or give such notice shall limit a time after such service or notice within which such defendant is to enter an appearance, such time to depend on the place or country where or within which the writ is to be served or the notice given.

Limit of time for appearance.

5. Notice in lieu of service shall be given in the manner in which writs of summons are served.

## ORDER XII.

## APPEARANCE.

Appearance in London. 1. Except in the cases otherwise provided for by these rules a defendant shall enter his appearance in London.

When appearance in registry compulsory. 2. If any defendant to a writ issued in a district registry resides or carries on business within the district, he shall appear in the district registry.

When optional. 3. If any defendant neither resides nor carries on business in the district he may appear either in the district registry or in London.

When action proceeds in registry. 4. If a sole defendant appears, or all the defendants appear in the district registry, or if all the defendants who appear, appear in the district registry and the others make default in appearance, then, subject to the power of removal hereinafter provided, the action shall proceed in the district registry.

When in London. 5. If the defendant appears, or any of the defendants appear, in London, the action shall proceed in London; provided that if the Court or a judge shall be satisfied that the defendant appearing in London is a merely formal defendant, or has no substantial cause to interfere in the conduct of the action, such Court or judge may order that the action may proceed in the district registry, notwithstanding such appearance in London.

Mode of appearance. 6. A defendant shall enter his appearance to a writ of summons by delivering to the proper officer a memorandum in writing, dated on the day of delivering the same, and containing the name of the defendant's solicitor, or stating that the defendant defends in person.

Notice of appearance. A defendant who appears elsewhere than where the writ is issued, shall on the same day give notice of his appearance to the plaintiff's solicitor, or to the plaintiff himself if he sues in person, either by notice in writing served in the ordinary way at the address for service within the district of the district registry, or by prepaid letter directed to such address, and posted on that day in due course of post.\*

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\* If the defendant in an action begun in a district registry do not give the notice and the plaintiff sign judgment, the judgment is regular, although an appearance has been entered in town. (*Smith v. Dobbin*, 47 L. J. Ex. 77; L. R. 3 Ex. D. 338.)

7. The solicitor of a defendant appearing by a solicitor shall state in such memorandum his place of business, and, if the appearance is entered in the London office, a place, to be called his address for service, which shall not be more than three miles from Temple Bar, and if the appearance is entered in a district registry, a place, to be called his address for service, which shall be within the district.

Address for service.

8. A defendant appearing in person shall state in such memorandum his address, and, if the appearance is entered in the London office, a place, to be called his address for service, which shall not be more than three miles from Temple Bar; and if the appearance is entered in a district registry, a place to be called his address for service, which shall be within the district.

Appearance in person.

Address of defendant.

9. If the memorandum does not contain such address it shall not be received; and if any such address shall be illusory or fictitious, the appearance may be set aside by the Court or a judge, on the application of the plaintiff.

Illusory address.

10. The memorandum of appearance shall be in the Form No. 6, Appendix (A), Part I.,\* with such variations as the circumstances of the case may require.

Form of memorandum.

11. Upon receipt of a memorandum of appearance, the officer shall forthwith enter the appearance in the cause book.

Entry of memorandum.

12. Where partners are sued in the name of their firm, they shall appear individually in their own names. But all subsequent proceedings shall, nevertheless, continue in the name of the firm.

Appearance of partners.

12A. Where any person carrying on business in the name of a firm apparently consisting of more than one person shall be sued in the name of the firm, he shall appear in his own name; but all subsequent proceedings shall, nevertheless, continue in the name of the firm.

Person trading as firm.

13. If two or more defendants in the same action shall appear by the same solicitor and at the same time, the names of all the defendants so appearing shall be inserted in one memorandum.

Appearance by one solicitor.

14. A solicitor not entering an appearance in

\* See p. 228.

Solicitor  
undertaking  
to appear.

pursuance of his written undertaking so to do on behalf of any defendant shall be liable to an attachment.

Time for  
appearance.

15. A defendant may appear at any time before judgment. If he appear at any time after the time limited for appearance he shall, on the same day, give notice thereof to the plaintiff's solicitor, or to the plaintiff himself if he sues in person, and he shall not, unless the Court or a judge otherwise orders, be entitled to any further time for delivering his defence, or for any other purpose, than if he had appeared according to the writ.

Interven-  
tion in  
Probate  
actions.

16. In Probate actions any person not named in the writ may intervene and appear in the action as heretofore, on filing an affidavit showing how he is interested in the estate of the deceased.

In Admi-  
ralty  
actions.

17. In an Admiralty action in rem any person not named in the writ may intervene and appear as heretofore, on filing an affidavit showing that he is interested in the res under arrest, or in the fund in the registry.

Recovery of  
land—ap-  
pearance by  
person not  
defendant.

18. Any person not named as a defendant in a writ of summons for the recovery of land may, by leave of the Court or judge, appear and defend, on filing an affidavit showing that he is in possession of the land either by himself or his tenant.

Appearance  
by landlord.

19. Any person appearing to defend an action for the recovery of land as landlord, in respect of property whereof he is in possession only by his tenant, shall state in his appearance that he appears as landlord.

Recovery of  
land—no-  
tice of ap-  
pearance by  
person not  
defendant.

20. Where a person not named as defendant in any writ of summons for the recovery of land has obtained leave of the Court or judge to appear and defend, he shall enter an appearance according to the foregoing rules, intituled in the action against the party or parties named in the writ as defendant or defendants, and shall forthwith give notice of such appearance to the plaintiff's solicitor, or to the plaintiff if he sues in person, and shall in all subsequent proceedings be named as a party defendant to the action.

Limitation  
of defence  
to part of  
land.

21. Any person appearing to a writ of summons for the recovery of land shall be at liberty to limit his defence to a part only of the property mentioned in the writ, describing that part with reasonable certainty in his memorandum of appearance, or in a



notice intituled in the cause, and signed by him or his solicitor ; such notice to be served within four days after appearance ; and an appearance where the defence is not so limited shall be deemed an appearance to defend for the whole.

22. The notice mentioned in the last preceding rule may be in the Form No. 7 in Part I. of Appendix (A) hereto, with such variations as circumstances may require. Notice of appearance.

### ORDER XIII.

#### DEFAULT OF APPEARANCE.

1. Where no appearance has been entered to a writ of summons for a defendant who is an infant or a person of unsound mind, not so found by inquisition, the plaintiff may apply to the Court or a judge for an order that some proper person be assigned guardian of such defendant, by whom he may appear and defend the action. But no such order shall be made unless it appears on the hearing of such application that the writ of summons was duly served, and that notice of such application was, after the expiration of the time allowed for appearance, and at least six clear days before the day in such notice named for hearing the application, served upon or left at the dwelling-house of the person with whom or under whose care such defendant was at the time of serving such writ of summons, and also (in the case of such defendant being an infant not residing with or under the care of his father or guardian) served upon or left at the dwelling-house of the father or guardian, if any, of such infant, unless the Court or judge, at the time of hearing such application, shall dispense with such last-mentioned service. Default of appearance by infant or person of unsound mind.

2. Where any defendant fails to appear to a writ of summons, and the plaintiff is desirous of proceeding upon default of appearance, under any of the following rules of this order, or under Order XV. Rule 1, he shall before taking such proceeding upon default, file an affidavit of service, or of notice in lieu of service, as the case may be. Default of appearance generally.

3. In case of non-appearance by the defendant, where the writ of summons is specially indorsed, under Order III. Rule 6, the plaintiff may sign final judgment for any sum not exceeding the sum indorsed Where writ specially indorsed.

on the writ, together with interest at the rate specified, if any, to the date of the judgment, and a sum for costs, but it shall be lawful for the Court or a judge to set aside or vary such judgment upon such terms as may seem just.

Where several defendants to writ specially indorsed.

4. Where there are several defendants to a writ specially indorsed for a debt, or liquidated demand in money, under Order III. Rule 6, and one or more of them appear to the writ, and another or others of them do not appear, the plaintiff may enter final judgment against such as have not appeared, and may issue execution upon such judgment, without prejudice to his right to proceed with his action against such as have appeared.

Where claim for debt on writ not specially indorsed.

5. Where the defendant fails to appear to the writ of summons, and the writ is not specially indorsed, but the plaintiff's claim is for a debt or liquidated demand only, no statement of claim need be delivered, but the plaintiff may file an affidavit of service or notice in lieu of service, as the case may be, and a statement of the particulars of his claim in respect of the causes of action stated in the indorsement upon the writ, and may, after the expiration of eight days, enter final judgment for the amount shown thereby and costs to be taxed, provided that the amount shall not be more than the sum indorsed upon the writ besides costs.

Where defendant may appear to registry writ in London.

5A. Where a defendant fails to appear to a writ of summons, issued out of a district registry, and the defendant had the option of entering an appearance either in the district registry or in the London office, judgment for want of appearance shall not be entered by the plaintiff until after such time as a letter posted in London on the previous evening, in due time for delivery to him on the following morning, ought, in due course of post, to have reached him.

Where claim for detention of goods or unliquidated damages.

6. Where the defendant fails to appear to the writ of summons, and the plaintiff's claim is not for a debt or liquidated demand only, but for detention of goods and pecuniary damages, or either of them, no statement of claim need be delivered, but interlocutory judgment may be entered, and a writ of inquiry shall issue to assess the value of the goods and the damages, or the damages only, as the case may be, in respect of the causes of action disclosed by the indorsement on the writ of summons. But the

Court or a judge may order that, instead of a writ of inquiry, the value and amount of damages, or either of them, shall be ascertained in any way in which any question arising in an action may be tried.

7. In case no appearance shall be entered in an action for the recovery of land, within the time limited for appearance, or if an appearance be entered but the defence be limited to part only, the plaintiff shall be at liberty to enter a judgment that the person whose title is asserted in the writ shall recover possession of the land, or of the part thereof to which the defence does not apply.

Where action for recovery of land.

8. Where the plaintiff has indorsed a claim for mesne profits, arrears of rent, or damages for breach of contract, upon a writ for the recovery of land, he may enter judgment as in the last preceding rule mentioned for the land; and may proceed as in the other preceding rules of this order as to such other claim so indorsed.

Where claim for mesne profits, &c., and land.

9. In actions assigned by the 34th section of the Act to the Chancery Division, and in Probate actions, and in all other actions not by the rules in this order otherwise specially provided for, in case the party served with the writ does not appear within the time limited for appearance, upon the filing by the plaintiff of a proper affidavit of service, the action may proceed as if such party had appeared.

In exclusive Chancery and Probate actions.

## ORDER XIV.

### LEAVE TO DEFEND WHERE WRIT SPECIALLY INDORSED.

1. Where the defendant appears to a writ of summons specially indorsed, under Order III. Rule 6, the plaintiff may, on affidavit made by himself or by any other person who can swear positively to the debt or cause of action, verifying the cause of action and stating that in his belief there is no defence to the action, call on the defendant to show cause before the Court or a judge why the plaintiff should not be at liberty to sign final judgment for the amount so indorsed, together with interest, if any, and costs. A copy of the affidavit shall accompany the summons or notice of motion. The Court or a judge may thereupon, unless the defendant, by

Summary application by plaintiff for judgment.

affidavit or otherwise, satisfy the Court or a judge that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend, make an order empowering the plaintiff to sign judgment accordingly.

Return of  
summons.

2. The application by the plaintiff for leave to enter final judgment under the last preceding rule shall be made by summons returnable not less than two clear days after service.

Defendant  
may show  
cause why  
judgment  
should not  
be signed.

3. The defendant may show cause against such application by offering to bring into Court the sum indorsed on the writ, or by affidavit. In such affidavit he shall state whether the defence he alleges goes to the whole or to part only, and if so, to what part, of the plaintiff's claim. And the judge may, if he think fit, order the defendant to attend and be examined upon oath; or to produce any books or documents, or copies of or extracts therefrom.

Judgment  
for part.

4. If it appear that the defence set up by the defendant applies only to a part of the plaintiff's claim, or that any part of his claim is admitted to be due, the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to or as is admitted to be due, subject to such terms, if any, as to suspending execution, or the payment of the amount levied or any part thereof into Court by the sheriff, the taxation of costs, or otherwise, as the judge may think fit. And the defendant may be allowed to defend as to the residue of the plaintiff's claim.

Judgment  
against one  
of many  
defendants.

5. If it appears to the judge that any defendant has a good defence to or ought to be permitted to defend the action, and that any other defendant has not such defence and ought not to be permitted to defend, the former may be permitted to defend, and the plaintiff shall be entitled to enter final judgment against the latter, and may issue execution upon such judgment without prejudice to his right to proceed with his action against the former.

Terms of  
leave to  
defend.

6. Leave to defend may be given unconditionally or subject to such terms as to giving security, or otherwise, as the Court or a judge may think fit.

## ORDER XV.

APPLICATION FOR ACCOUNT WHERE WRIT INDORSED  
UNDER ORDER III. RULE 8.

1. In default of appearance to a summons indorsed under Order III. Rule 8, and after appearance unless the defendant, by affidavit or otherwise, satisfy the Court or a judge that there is some preliminary question to be tried, an order for the account claimed, with all directions now usual in the Court of Chancery in similar cases, shall be forthwith made.

Summary  
order for  
account.

2. An application for such order as mentioned in the last preceding rule shall be made by summons, and be supported by an affidavit filed on behalf of the plaintiff, stating concisely the grounds of his claim to an account. The application may be made at any time after the time for entering an appearance has expired.

Mode and  
time of ap-  
plication for  
order for  
account.

## ORDER XVI.

## PARTIES.

1. All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person or persons who shall not be found entitled to relief, unless the Court in disposing of the costs of the action shall otherwise direct.

Joint,  
several, and  
alternative  
claims by  
plaintiffs.

2. Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff or plaintiffs, the Court or a judge may, if satisfied that it has been so commenced through a bonâ fide mistake,\* and that it is necessary for the determination of the real matter in dispute so

Substitu-  
tion of other  
person for  
wrong  
plaintiff.

\* This includes a mistake of law. (*Duckett v. Gover*, 46 L. J. Ch. 487, L. R. 6 Ch. 82.)

to do, order any other person or persons to be substituted or added as plaintiff or plaintiffs upon such terms as may seem just.

Joint,  
several and  
alternative  
claims  
against de-  
fendants.

3. All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment.

Defendant  
need not be  
wholly in-  
terested.

4. It shall not be necessary that every defendant to any action shall be interested as to all the relief thereby prayed for, or as to every cause of action included therein; but the Court or a judge may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in such action in which he may have no interest.

Defendants  
severally  
liable may  
be joined,  
and jointly  
liable sepa-  
rated.

5. The plaintiff may, at his option, join as parties to the same action all or any of the persons severally, or jointly and severally, liable to any one contract, including parties to bills of exchange and promissory notes.

Joinder of  
two defend-  
ants in case  
of doubt.

6. Where in any action, whether founded upon contract or otherwise, the plaintiff is in doubt as to the person from whom he is entitled to redress, he may, in such manner as hereinafter mentioned, or as may be prescribed by any special order, join two or more defendants, to the intent that in such action the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties to the action.

Beneficia-  
ries may be  
represented  
by their  
trustees.

7. Trustees, executors and administrators may sue and be sued on behalf of or as representing the property or estate of which they are trustees or representatives, without joining any of the parties beneficially interested in the trust or estate, and shall be considered as representing such parties in the action; but the Court or a judge may, at any stage of the proceedings, order any of such parties to be made parties to the action, either in addition to or in lieu of the previously-existing parties thereto.

Married  
women and  
infants.

8. Married women and infants may respectively sue as plaintiffs by their next friends in the manner practised in the Court of Chancery before the passing of this Act; and infants may, in like manner,

defend any action by their guardians appointed for that purpose. Married women may also, by the leave of the Court or a judge, sue or defend without their husbands and without a next friend, on giving such security (if any) for costs as the Court or a judge may require.

9. Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued, or may be authorized by the Court to defend in such action, on behalf or for the benefit of all parties so interested.

Numerous parties may be represented by one.

9A. In any case in which the right of an heir-at-law or the next of kin or a class shall depend upon the construction which the Court may put upon an instrument, and it shall not be known or be difficult to ascertain who is or are such heir-at-law or next of kin or class, and the Court shall consider that in order to save expense or from some other reason it will be convenient to have the question or questions of construction determined before such heir-at-law, next of kin, or class shall have been ascertained by means of inquiry or otherwise, the Court may appoint some one or more persons to represent such heir-at-law, next of kin, or class, and the judgment of the Court in the presence of such person or persons shall be binding upon the party or parties or class so represented.

Representing unascertained persons.

10. Any two or more persons claiming or being liable as copartners may sue or be sued in the name of their respective firms, if any; and any party to an action may in such case apply by summons to a judge for a statement of the names of the persons who are copartners in any such firm, to be furnished in such manner and verified on oath or otherwise, as the judge may direct.

Partners joined in the name of their firms.

10A. Any person carrying on business in the name of a firm apparently consisting of more than one person may be sued in the name of such firm.

Person trading as firm.

11. Subject to the provisions of the Act and these rules, the provisions as to parties, contained in section 42 of 15 & 16 Victoria, chapter 86, shall be in force as to actions in the High Court of Justice.

Incorporation of Chancery procedure as to parties.

12. Subject as last aforesaid, in all Probate actions the rules as to parties, heretofore in use in the Court of Probate, shall continue to be in force.

Maintenance of Probate procedure as to parties.

13. No action shall be defeated by reason of the misjoinder of parties, and the Court may in every

Amendment in case

of mis-  
joinder of  
parties.

action deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a judge to be just, order that the name or names of any party or parties, whether as plaintiffs or as defendants, improperly joined be struck out, and that the name or names of any party or parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action, be added. No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent thereto. All parties whose names are so added as defendants shall be served with a summons or notice in manner hereinafter mentioned, or in such manner as may be prescribed by any special order, and the proceedings as against them shall be deemed to have begun only on the service of such summons or notice.

Adding  
parties.

Application  
to amend.

14. Any application to add or strike out or substitute a plaintiff or defendant may be made to the Court or a judge at any time before trial by motion or summons, or at the trial of the action in a summary manner.

Service by  
plaintiff of  
amended  
writ on new  
defendant.

15. Where a defendant is added, unless otherwise ordered by the Court or judge, the plaintiff shall file an amended copy of and sue out a writ of summons, and serve such new defendant with such writ or notice in lieu of service thereof in the same manner as original defendants are served.

Delivery of  
amended  
statement of  
claim.

16. If a statement of claim has been delivered previously to such defendant being added, the same shall, unless otherwise ordered by the Court or judge, be amended in such manner as the making such new defendant a party shall render desirable, and a copy of such amended statement of claim shall be delivered to such new defendant at the time when he is served with the writ of summons or notice or afterwards, within four days after his appearance.

Claim by  
defendant  
against  
third party.

17. Where a defendant is or claims to be entitled to contribution or indemnity, or any other remedy



or relief over against any other person, or where from any other cause it appears to the Court or a judge that a question in the action should be determined not only as between the plaintiff and defendant, but as between the plaintiff, defendant, and any other person, or between any or either of them, the Court or a judge may on notice being given to such last-mentioned person, make such order as may be proper for having the question so determined.

18. Where a defendant claims to be entitled to contribution, indemnity, or other remedy or relief over against any person not a party to the action, he may, by leave of the Court or a judge, issue a notice to that effect, stamped with the seal with which writs of summons are sealed. A copy of such notice shall be filed with the proper officer, and served on such person according to the rules relating to the service of writs of summons. The notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by the Court or a judge, be served within the time limited for delivering his statement of defence. Such notice may be in the form or to the effect of the Form No. 1 in Appendix (B) hereto, with such variations as circumstances may require, and therewith shall be served a copy of the statement of claim, or if there be no statement of claim, then a copy of the writ of summons in the action. Notice to third party.  
Form of notice.

19. When under Rule 17 of this order it is made to appear to the Court or a judge at any time before or at the trial that a question in the action should be determined, not only as between the plaintiff and defendant, but as between the plaintiff and the defendant and any other person, or between any or either of them, the Court or a judge, before or at the time of making the order for having such question determined, shall direct such notice to be given by the plaintiff at such time and to such person and in such manner as may be thought proper, and, if made at the trial, the judge may postpone such trial as he may think fit. Third party added by judge.

20. If a person not a party to the action, who is served as mentioned in Rule 18, desires to dispute the plaintiff's claim in the action as against the defendant on whose behalf the notice has been given, he must enter an appearance in the action within Appearance by third party.

On default,  
taken to  
admit judgment  
against defendant.

eight days from the service of the notice. In default of his so doing, he shall be deemed to admit the validity of the judgment obtained against such defendant, whether obtained by consent or otherwise: provided always, that a person so served, and failing to appear within the said period of eight days may apply to the Court or a judge for leave to appear, and such leave may be given upon such terms, if any, as the Court or a judge shall think fit.

Further  
proceedings  
on appearance  
of third  
party.

21. If a person not a party to the action, served under these rules appears pursuant to the notice, the party giving the notice may apply to the Court or a judge for directions as to the mode of having the question in the action determined; and the Court or judge, upon the hearing of such application, may, if it shall appear desirable so to do, give the person so served liberty to defend the action upon such terms as shall seem just, and may direct such pleadings to be delivered, or such amendments in any pleadings to be made, and generally may direct such proceedings to be taken, and give such directions as to the Court or a judge shall appear proper for having the question most conveniently determined, and as to the mode and extent in or to which the person so served shall be bound or made liable by the decision of the question.\*

## ORDER XVII.

### JOINDER OF CAUSES OF ACTION.

All causes of  
action may  
be joined  
subject to  
severance.

1. Subject to the following rules, the plaintiff may unite in the same action and in the same statement of claim several causes of action, but if it appear to the Court or a judge that any such causes of action cannot be conveniently tried or disposed of together, the Court or judge may order separate trials of any

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\* This does not enable the defendant to obtain relief against the third party. The process is intended to make the judgment in the action indisputable afterwards by the third party, against whom the defendant must bring a fresh action if he desire relief. (Per Mellish, L. J. *Treleaven v. Bray*, 45 L. J. Ch. 113, L. R. 1 Ch. D. 176.)

of such causes of action to be had, or may make such other order as may be necessary or expedient for the separate disposal thereof.

2. No cause of action shall, unless by leave of the Court or a judge,\* be joined with an action for the recovery of land, except claims in respect of mesne profits or arrears of rent in respect of the premises claimed, or any part thereof, and damages for breach of any contract under which the same or any part thereof are held.

Exception  
in recovery  
of land.

3. Claims by a trustee in bankruptcy as such shall not, unless by leave of the Court or a judge, be joined with any claim by him in any other capacity.

In bank-  
ruptcy.

4. Claims by or against husband and wife may be joined with claims by or against either of them separately.

By or  
against hus-  
band and  
wife.

5. Claims by or against an executor or administrator as such may be joined with claims by or against him personally, provided the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator.

By or  
against exe-  
cutor.

6. Claims by plaintiffs jointly may be joined with claims by them or any of them separately against the same defendant.

Joint claims  
joined with  
several.

7. The last three preceding rules shall be subject to Rule 1 of this order. and to the rules hereinafter contained.

8. Any defendant alleging that the plaintiff has united in the same action several causes of action which cannot be conveniently disposed of in one action, may at any time apply to the Court or a judge for an order confining the action to such of the causes of action as may be conveniently disposed of in one proceeding.

Application  
for sever-  
ance.

9. If, on the hearing of such application as in the last preceding rule mentioned, it shall appear to the Court or a judge that the causes of action are such as cannot all be conveniently disposed of in one action, the Court or a judge may order any of such causes of action to be excluded, and may direct the statement

Order for  
severance  
joinder in-  
convenient.

\* A claim for the administration of personalty was allowed to be joined with a claim for the recovery of land where both personalty and land were comprised in the same gift. (*Whetstone v. Lewis*, 45 L. J. Ch. 40, L. R. 1 Ch. D. 99.)

of claim, or, if no statement of claim has been delivered, the copy of the writ of summons, and the indorsement of claim on the writ of summons, to be amended accordingly, and may make such order as to costs as may be just.

### ORDER XVIII.

#### ACTIONS BY AND AGAINST LUNATICS AND PERSONS OF UNSOUND MIND.

Lunatics may sue and be sued as in Chancery before Act.

In all cases in which lunatics and persons of unsound mind not so found by inquisition might respectively before the passing of the Act have sued as plaintiffs, or would have been liable to be sued as defendants in any action or suit, they may respectively sue as plaintiffs in any action by their committee or next friend in manner practised in the Court of Chancery before the passing of the said Act, and may in like manner defend any action by their committees or guardians appointed for that purpose.

### ORDER XIX.

#### PLEADING GENERALLY.

New pleading.

1. The following rules of pleading shall be substituted for those heretofore used in the High Court of Chancery, and in the Courts of Common Law, Admiralty, and Probate.

Statement of complaint.

2. Unless the defendant in an action at the time of his appearance shall state that he does not require the delivery of a statement of complaint, the plaintiff shall within such time and in such manner as hereinafter prescribed, deliver to the defendant after his appearance, a statement of his complaint, and of the relief or remedy to which he claims to be entitled.

Defence.

The defendant shall within such time and in such manner as hereinafter prescribed, deliver to the plaintiff a statement of his defence, set-off, or counter-claim (if any), and the plaintiff shall in like manner deliver a statement of his reply (if any) to such defence, set-off, or counter-claim. Such statements shall be as brief as the nature of the case will admit, and the Court in adjusting the costs of the action shall inquire at the instance of any party into any

Reply

Costs.

unnecessary prolixity, and order the costs occasioned by such prolixity to be borne by the party chargeable with the same.

3. A defendant in an action may set-off, or set up, by way of counter-claim against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim. But the Court or a judge may, on the application of the plaintiff before trial, if in the opinion of the Court or judge such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof.\*

Set-off and counter-claim.

4. Every pleading shall contain as concisely as may be a statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved, such statement being divided into paragraphs, numbered consecutively, and each paragraph containing, as nearly as may be, a separate allegation. Dates, sums, and numbers shall be expressed in figures and not in words. Signature of counsel shall not be necessary. Forms similar to those in Appendix (C) † hereto may be used.

Pleading not to contain evidence.

Forms of pleading.

5. Every pleading which shall contain less than ten folios of 72 words each (every figure being counted as one word) may be either printed or written, or partly printed and partly written and every other pleading, not being a petition or summons, shall be printed.

Printing and writing pleadings.

6. Every pleading or other document required to be delivered to a party, or between parties, shall be delivered in the manner now in use to the solicitor of every party who appears by a solicitor, or to the party if he does not appear by a solicitor, but if no appearance has been entered for any party, then such pleading or document shall be delivered by being filed with the proper officer.

Delivery of pleadings.

\* A joint claim by two plaintiffs may be met by a separate counter-claim against each. (*Manchester, &c. v. Brooks*, 46 L. J. Ex. 244, L. R. 2 Ex. D. 243.)

† See pp. 229, 230, 238, 241.

Formal contents of pleadings.

7. Every pleading in an action shall be delivered between parties, and shall be marked on the face with the date of the day on which it is delivered, and with the reference to the letter and number of the action, the division to which and the judge (if any) to whom the action is assigned, the title of the action, the description of the pleading, and the name and place of business of the solicitor and agent, if any, delivering the same, or the name and address of the party delivering the same if he does not act by a solicitor.

Statement of claim.

8. Every statement of claim shall state specifically the relief which the plaintiff claims, either simply or in the alternative, and may also ask for general relief. And the same rule shall apply to any counter-claim made, or relief claimed by the defendant, in his statement of defence. If the plaintiff's claim be for discovery only, the statement of claim shall show it.

Separation of distinct claims and counter-claims.

9. Where the plaintiff seeks relief in respect of several distinct claims or causes of complaint founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly. And the same rule shall apply where the defendant relies upon several distinct grounds of defence, set-off, or counter-claim founded upon separate and distinct facts.

Set-off and counter-claim.

10. Where any defendant seeks to rely upon any facts as supporting a right of set-off or counter-claim, he shall, in his statement of defence, state specifically that he does so by way of set-off or counter-claim.

Denial of right of executor, &c.

11. If either party wishes to deny the right of any other party to claim as executor, or as trustee, whether in bankruptcy or otherwise, or in any representative or other alleged capacity, or the alleged constitution of any partnership firm, he shall deny the same specifically.

Interest actions.

12. In Probate actions where the plaintiff disputes the interest of the defendant, he shall allege in his statement of claim that he denies the defendant's interest.

No plea in abatement.

13. No plea or defence shall be pleaded in abatement.

No new assignment.

14. No new assignment shall hereafter be necessary or used. But everything which has heretofore been alleged by way of new assignment may hereafter be introduced by amendment of the statement of claim.

15. No defendant in an action for the recovery of land, who is in possession by himself or his tenant, need plead his title, unless his defence depends on an equitable estate or right, or he claims relief upon any equitable ground against any right or title asserted by the plaintiff. But, except in the cases hereinbefore mentioned, it shall be sufficient to state by way of defence that he is so in possession. And he may nevertheless rely upon any ground of defence which he can prove, except as hereinbefore mentioned.

Recovery  
land.

16. Nothing in these rules contained shall affect the right of any defendant to plead not guilty by statute. And every defence of not guilty by statute shall have the same effect as a plea of not guilty by statute has heretofore had. But if the defendant so plead he shall not plead any other defence without the leave of the Court or a judge.

Not guilty  
by statute.

17. Every allegation of fact in any pleading in an action, not being a petition or summons, if not denied specifically, or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant, lunatic, or person of unsound mind not so found by inquisition.

Allegation  
not denied  
taken to be  
admitted.

18. Each party in any pleading, not being a petition or summons, must allege all such facts not appearing in the previous pleadings as he means to rely on, and must raise all such grounds of defence or reply, as the case may be, as if not raised on the pleadings would be likely to take the opposite party by surprise, or would raise new issues of fact not arising out of the pleadings, as, for instance, fraud, or that any claim has been barred by the Statute of Limitations or has been released.

Raising  
issues.

19. No pleading, not being a petition or summons, shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same.

Departure.

20. It shall not be sufficient for a defendant in his defence to deny generally the facts alleged by the statement of claim, or for a plaintiff in his reply to deny generally the facts alleged in a defence by way of counter-claim, but each party must deal specifically with each allegation of fact of which he does not admit the truth

Specific  
answer to  
claim and  
counter-  
claim.

Joinder of  
issue.

21. Subject to the last preceding rule, the plaintiff by his reply may join issue upon the defence, and each party in his pleading, if any, subsequent to reply, may join issue upon the previous pleading. Such joinder of issue shall operate as a denial of every material allegation of fact in the pleading upon which issue is joined, but it may except any facts which the party may be willing to admit, and shall then operate as a denial of the facts not so admitted.

Unfair  
denials  
forbidden.

22. When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And so when a matter of fact is alleged with divers circumstances, it shall not be sufficient to deny it as alleged along with those circumstances, but a fair and substantial answer must be given.

Denial of  
contract.

23. When a contract is alleged in any pleading, a bare denial of the contract by the opposite party shall be construed only as a denial of the making of the contract in fact, and not of its legality or its sufficiency in law, whether with reference to the Statute of Frauds or otherwise.\*

Statute of  
Frauds.

Documents  
to be ab-  
stracted.

24. Wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole, or any part thereof, unless the precise words of the document, or any part thereof, are material.

Allegation  
of malice.

25. Wherever it is material to allege malice, fraudulent intention, knowledge, or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.

Allegation  
of notice.

26. Wherever it is material to allege notice to any person of any fact, matter, or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice be material.

Of implied  
agreement.

27. Wherever any contract, or any relation between any persons, does not arise from an express

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\* The Statute of Frauds must be specifically pleaded. (*Clarke v. Callow*, 46 L. J. Q. B. 53.)



agreement, but is to be implied from a series of letters or conversations, or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations, or circumstances without setting them out in detail. And if, in such case, the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative.

28. Neither party need in any pleading allege any matter of fact which the law presumes in his favour, or as to which the burden of proof lies upon the other side, unless the same has first been specifically denied. Presump-  
tions of law  
not to be  
alleged.

[E.g.—Consideration for a bill of exchange, where the plaintiff sues only on the bill, and not for the consideration as a substantive ground of claim.]

29. Where an action proceeds in a district registry all pleadings and other documents required to be filed shall be filed in the district registry. Filing in  
district  
registry;

29A. When a cause in the Chancery Division is proceeding in a District Registry, all certificates of the Chief Clerk and taxing masters and all affidavits and other documents (required to be filed) used in London before the judge in Chambers or before any taxing master or referee of the Court and not already filed in the District Registry shall be filed in the same office as they would have been filed in if the proceedings had originally commenced in London; and if the Court or judge shall so direct office copies thereof shall be transmitted to the District Registry.

30. In actions for damage by collision between vessels, unless the Court or a judge shall otherwise order, each solicitor shall, before any pleading is delivered, file with the proper officer a document to be called a Preliminary Act, which shall be sealed up and shall not be opened until ordered by the Court or a judge, and which shall contain a statement of the following particulars :— Collision of  
vessels.  
  
Preliminary  
Act.

(a.) The names of the vessels which came into collision, and the names of their masters.

(b.) The time of the collision.

(c.) The place of the collision.

(d.) The direction of the wind.

(e.) The state of the weather.

(f.) The state and force of the tide.

(g.) The course and speed of the vessel when the other was first seen.

(h.) The lights, if any, carried by her.

(i.) The distance and bearing of the other vessel when first seen.

(k.) The lights, if any, of the other vessel which were first seen.

(l.) Whether any lights of the other vessel, other than those first seen, came into view before the collision.

(m.) What measures were taken, and when, to avoid the collision.

(n.) The parts of each vessel which first came into contact.

Opening of  
preliminary  
acts.

If both solicitors consent, the Court or a judge may order the preliminary acts to be opened, and the evidence to be taken thereon, without its being necessary to deliver any pleadings.

## ORDER XX.

### PLEADING MATTERS ARISING PENDING THE ACTION.

Before  
statement  
of defence.

1. Any ground of defence which has arisen after action brought, but before the defendant has delivered his statement of defence, and before the time limited for his doing so has expired, may be pleaded by the defendant in his statement of defence, either alone or together with other grounds of defence. And if, after a statement of defence has been delivered, any ground of defence arises to any set-off or counter-claim alleged therein by the defendant, it may be pleaded by the plaintiff in his reply, either alone or together with any other ground of reply.

After state-  
ment of  
defence.

2. Where any ground of defence arises after the defendant has delivered a statement of defence, or after the time limited for his doing so has expired, the defendant may, and where any ground of defence to any set-off or counter-claim arises after reply, or after the time limited for delivering a reply has expired, the plaintiff may, within eight days after such ground of defence has arisen, and by leave of the Court or a judge, deliver a further defence or further reply, as the case may be, setting forth the same.

Confession  
of defence.

3. Whenever any defendant, in his statement of defence, or in any further statement of defence as in the last rule mentioned, alleges any ground of defence

which has arisen after the commencement of the action, the plaintiff may deliver a confession of such defence, which confession may be in the Form No. 2 in Appendix (B) hereto, with such variations as circumstances may require, and he may thereupon sign judgment for his costs up to the time of the pleading of such defence unless the Court or a judge shall, either before or after the delivery of such confession, otherwise order.

### ORDER XXI.

#### STATEMENT OF CLAIM.

1. Subject to Rules 2 and 3 of this Order, the delivery of statements of claim shall be regulated as follows :—

(a.) If the defendant shall not state that he does not require the delivery of a statement of claim the plaintiff shall, unless otherwise ordered by the Court or a judge, deliver it within six weeks from the time of the defendant's entering his appearance.

(b.) The plaintiff may, if he think fit, at any time after the issue of the writ of summons, deliver a statement of claim, with the writ of summons or notice in lieu of writ of summons, or at any time afterwards, either before or after appearance, and although the defendant may have appeared and stated that he does not require the delivery of a statement of claim : provided that in no case where a defendant has appeared shall a statement be delivered more than six weeks after the appearance has been entered, unless otherwise ordered by the Court or a judge.

(c.) Where a plaintiff delivers a statement of claim without being required to do so, the Court or a judge may make such order as to the costs occasioned thereby as shall seem just, if it appears that the delivery of a statement of claim was unnecessary or improper.

2. In Probate actions the plaintiff shall, unless otherwise ordered by the Court or a judge, deliver his statement of claim within six weeks from the entry of appearance by the defendant, or from the time limited for his appearance, in case he has made default ; but where the defendant has appeared the plaintiff shall not be compelled to deliver it until the

expiration of eight days after the defendant has filed his affidavits as to scripts.

In Admiralty actions.

3. In Admiralty actions in rem the plaintiff shall, within twelve days from the appearance of the defendant, deliver his statement of claim.

Notice that special indorsement is statement of claim.

4. Where the writ is specially indorsed, and the defendant has not dispensed with a statement of claim, it shall be sufficient for the plaintiff to deliver as his statement of claim a notice to the effect that his claim is that which appears by the indorsement upon the writ, unless the Court or a judge shall order him to deliver a further statement.\* Such notice may be either written or printed, or partly written and partly printed, and may be in the Form No. 3 in Appendix (B) hereto, and shall be marked on the face in the same manner as is required in the case of an ordinary statement of claim. And when the plaintiff is ordered to deliver such further statement it shall be delivered within such time as by such order shall be directed, and if no time be so limited, then within the time prescribed by Rule 1 of this Order.

## ORDER XXII.

### DEFENCE.

Time for delivering defence.

1. Where a statement of claim is delivered to a defendant he shall deliver his defence within eight days from the delivery of the statement of claim, or from the time limited for appearance, whichever shall be last, unless such time is extended by the Court or a judge.†

Where defence voluntary.

2. A defendant who has appeared in an action and stated that he does not require the delivery of a statement of claim, and to whom a statement of claim is not delivered, may deliver a defence at any time within eight days after his appearance, unless such time is extended by the Court or a judge.

Where leave given to defend.

3. Where leave has been given to a defendant to defend under Order XIV. Rule 1, he shall deliver his defence, if any, within such time as shall be

\* An indorsement standing for statement of claim may be demurred to. (*Robertson v. Howard*, 47 L. J. C. P. 480.)

† An order extending the time for the delivery of "defence" extends it for demurring. (*Hodges v. Hodges*, 45 L. J. Ch. 750, L. R. 2 Ch. D. 112.)

limited by the order giving him leave to defend ; or if no time is thereby limited, then within eight days after the order.

4. Where the Court or a judge shall be of opinion that any allegations of fact denied or not admitted by the defence ought to have been admitted, the Court may make such order as shall be just with respect to any extra costs occasioned by their having been denied or not admitted.

Costs of improper denial or non-admission of facts.

5. Where a defendant by his defence sets up any counter-claim which raises questions between himself and the plaintiff along with any other person or persons, he shall add, to the title of his defence a further title similar to the title in a statement of complaint, setting forth the names of all the persons who, if such counter-claim were to be enforced by cross action, would be defendants to such cross action, and shall deliver his defence to such of them as are parties to the action within the period within which he is required to deliver it to the plaintiff.

Counter-claim involving others than plaintiff.

6. Where any such person as in the last preceding rule mentioned is not a party to the action, he shall be summoned to appear by being served with a copy of the defence, and such service shall be regulated by the same rules as are hereinbefore contained with respect to the service of a writ of summons, and every defence so served shall be indorsed in the Form No. 4 in Appendix (B) hereto, or to the like effect.

Counter-claim against person not party.

7. Any person not a defendant to the action, who is served with a defence and counter-claim as aforesaid, must appear thereto as if he had been served with a writ of summons to appear in an action.

Appearance by such party to counter-claim.

8. Any person named in a defence as a party to a counter-claim thereby made may deliver a reply within the time within which he might deliver a defence if it were a statement of claim.

Reply in nature of defence by such party.

9. Where a defendant by his statement of defence sets up a counter-claim, if the plaintiff or any other person named in manner aforesaid as party to such counter-claim contends that the claim thereby raised ought not to be disposed of by way of counter-claim, but in an independent action, he may at any time, before reply, apply to the Court or a judge for an order that such counter-claim may be excluded, and the Court or a judge may, on the hearing of such application, make such order as shall be just.

Application to exclude counter-claim.

10. Where in any action a set-off or counter-claim

Judgment  
for defend-  
ant for bal-  
ance.

is established as a defence against the plaintiff's claim, the Court may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case.

Notice in  
Probate ac-  
tions of in-  
tention to  
cross-exa-  
mine.

11. In Probate actions the party opposing a will may, with his defence, give notice to the party setting up the will that he merely insists upon the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the will, and he shall thereupon be at liberty to do so, and shall be subject to the same liabilities in respect of costs as he would have been under similar circumstances according to the practice of the Court of Probate.

### ORDER XXIII.

#### DISCONTINUANCE.

Before de-  
fence by  
notice.

1. The plaintiff may, at any time before receipt of the defendant's statement of defence, or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application), by notice in writing, wholly discontinue his action or withdraw any part or parts of his alleged cause of complaint, and thereupon he shall pay the defendant's costs of the action, or, if the action be not wholly discontinued, the defendant's costs occasioned by the matter so withdrawn. Such costs shall be taxed, and such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action. Save as in this rule otherwise provided, it shall not be competent for the plaintiff to withdraw the record or discontinue the action without leave of the Court or a judge, but the Court or a judge may, before, or at, or after the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise as may seem fit, order the action to be discontinued, or any part of the alleged cause of complaint to be struck out. The Court or a judge may, in like manner, and with the like discretion as to terms, upon the application of a defendant, order the whole or any part of his alleged grounds of defence or counter-claim to be withdrawn or struck

Afterwards  
by leave.

Withdrawal  
of defence.

out, but it shall not be competent to a defendant to withdraw his defence, or any part thereof, without such leave.

2. When a cause has been entered for trial, it may be withdrawn by either plaintiff or defendant upon producing to the proper officer a consent in writing signed by the parties. Withdrawal by consent.

3. A defendant may sign judgment for the costs of an action if it is wholly discontinued, or for the costs occasioned by the matter withdrawn, if the action be not wholly discontinued. Costs.

### ORDER XXIV.

#### REPLY AND SUBSEQUENT PLEADINGS.

1. A plaintiff shall deliver his reply, if any, within three weeks after the defence or the last of the defences shall have been delivered, unless the time shall be extended by the Court or a judge. Time for reply.

2. No pleading subsequent to reply other than a joinder of issue shall be pleaded without leave of the Court or a judge, and then upon such terms as the Court or judge shall think fit. Pleadings subsequent to reply by leave.

3. Subject to the last preceding rule, every pleading subsequent to reply shall be delivered within four days after the delivery of the previous pleading, unless the time shall be extended by the Court or a judge. Time for subsequent pleadings.

### ORDER XXV.

#### CLOSE OF PLEADINGS.

As soon as either party has joined issue upon any pleading of the opposite party simply without adding any further or other pleading thereto, the pleadings as between such parties shall be deemed to be closed. Joinder of issue to be close of pleadings.

### ORDER XXVI.

#### ISSUES.

Where in any action it appears to a judge that the statement of claim or defence or reply does not sufficiently define the issues of fact in dispute between the parties, he may direct the parties to prepare issues, and such issues shall, if the parties differ, be settled by the judge. Settlement of issues by judge.

## ORDER XXVII.

## AMENDMENT OF PLEADINGS.

Striking out  
embarrass-  
ing and  
introducing  
necessary  
matter.

1. The Court or a judge may, at any stage of the proceedings, allow either party to alter his statement of claim or defence or reply, or may order to be struck out or amended any matter in such statements respectively which may be scandalous, or which may tend to prejudice, embarrass or delay the fair trial of the action, and all such amendments shall be made as may be necessary for the purpose of determining the real questions or question in controversy between the parties.

Amendment  
without  
leave, by  
plaintiff.

2. The plaintiff may, without any leave, amend his statement of claim once at any time before the expiration of the time limited for reply and before replying, or, where no defence is delivered, at any time before the expiration of four weeks from the appearance of the defendant who shall have last appeared.

Without  
leave by  
defendant.

3. A defendant who has set up in his defence any set-off or counter-claim may, without any leave, amend such set-off or counter-claim at any time before the expiration of the time allowed him for pleading to the reply, and before pleading thereto; or in case there be no reply, then at any time before the expiration of twenty-eight days from the filing of his defence.

Disallow-  
ance of  
amend-  
ment.

4. Where any party has amended his pleading under either of the last two preceding rules, the opposite party may, within eight days after the delivery to him of the amended pleading, apply to the Court or a judge to disallow the amendment, or any part thereof, and the Court or judge may, if satisfied that the justice of the case requires it, disallow the same, or allow it subject to such terms as to costs or otherwise as may seem just.

Counter-  
amend-  
ment.

5. Where any party has amended his pleading under Rule 2 or 3 of this Order, the other party may apply to the Court or a judge for leave to plead or amend his former pleading within such time and upon such terms as may seem just.

Amend-  
ment by  
leave.

6. In all cases not provided for by the preceding rules of this Order, application for leave to amend any pleading may be made by either party to the Court or a judge in chambers, or to the judge at the trial of the action, and such amendment may be



allowed upon such terms as to costs or otherwise as may seem just.

7. If a party who has obtained an order for leave to amend a pleading delivered by him does not amend the same within the time limited for that purpose by the order, or if no time is thereby limited, then within fourteen days from the date of the order, such order to amend shall, on the expiration of such limited time as aforesaid, or of such fourteen days, as the case may be, become ipso facto void, unless the time is extended by the Court or a judge.

Lapse of order to amend.

8. A pleading may be amended by written alterations in the pleading which has been delivered, and by additions on paper to be interleaved therewith if necessary, unless the amendments require the insertion of more than 144 words in any one place, or are so numerous or of such a nature that the making them in writing would render the pleading difficult or inconvenient to read, in either of which cases the amendment must be made by delivering a print of the pleading as amended.

Amendment, whether to be in writing or printed.

9. Whenever any pleading is amended, such pleading, when amended, shall be marked with the date of the order, if any, under which the same is so amended, and of the day on which such amendment is made, in manner following, viz.: "Amended

Date of amendment to be marked.

day of ."

10. Whenever a pleading is amended, such amended pleading shall be delivered to the opposite party within the time allowed for amending the same.

Delivery of amended pleading.

11. The Court, or a judge, may, at any stage of the proceedings, allow the plaintiff to amend the writ of summons in such manner, and on such terms, as may seem just.

Amendment of writ of summons.

## ORDER XXVIII.

### DEMURRER.

1. Any party may demur to any pleading of the opposite party, or to any part of a pleading setting up a distinct cause of action, ground of defence, set-off, counter-claim, reply, or as the case may be, on the ground that the facts alleged therein do not show any cause of action or ground of defence to a claim or any part thereof, or set-off, or counter-

To distinct allegation.

claim, or reply, or as the case may be, to which effect can be given by the Court as against the party demurring.

Ground of demurrer.

2. A demurrer shall state specifically whether it is to the whole or to a part, and if so, to what part, of the pleading of the opposite party. It shall state some ground in law for the demurrer, but the party demurring shall not, on the argument of the demurrer, be limited to the ground so stated. A demurrer may be in the Form No. 28 in Appendix (C)\* hereto. If there is no ground, or only a frivolous ground of demurrer stated, the Court or judge may set aside such demurrer, with costs.

Time of demurrer.

3. A demurrer shall be delivered in the same manner and within the same time as any other pleading in the action.

Demurrer to part and defence to rest

4. A defendant desiring to demur to part of a statement of claim and to put in a defence to the other part, shall combine such demurrer and defence in one pleading. And so in every case where a party entitled to put in a further pleading desires to demur to part of the last pleading of the opposite party he shall combine such demurrer and other pleading.

Demurrer and pleading to same allegation.

5. If the party demurring desires to be at liberty to plead as well as demur to the matter demurred to, he may, before demurring, apply to the Court or a judge for an order giving him leave to do so; and the Court or judge, if satisfied that there is reasonable ground for the demurrer, may make an order accordingly, or may reserve leave to him to plead after the demurrer is overruled, or may make such other order and upon such terms as may be just.

Entry for argument

6. When a demurrer either to the whole or part of a pleading is delivered, either party may enter the demurrer for argument immediately, and the party so entering such demurrer shall on the same day give notice thereof to the other party. If the demurrer shall not be entered and notice thereof given within ten days after delivery, and if the party whose pleading is demurred to does not within such time serve an order for leave to amend, the demurrer shall be held sufficient for the same purposes and with the same result as to costs as if it had been allowed on argument.

Amendment pending demurrer.

7. While a demurrer to the whole or any part of

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\* See p. 239.

a pleading is pending, such pleading shall not be amended unless by order of the Court or a judge; and no such order shall be made except on payment of the costs of the demurrer.

8. Where a demurrer to the whole or part of any pleading is allowed upon argument, the party whose pleading is demurred to shall, unless the Court otherwise order, pay to the demurring party the costs of the demurrer. Costs of demurrer.

9. If a demurrer to the whole of a statement of claim be allowed, the plaintiff, subject to the power of the Court to allow the statement of claim to be amended, shall pay to the demurring defendant the costs of the action, unless the Court shall otherwise order. Costs on successful demurrer to whole claim.

10. Where a demurrer to any pleading or part of a pleading is allowed in any case not falling within the last preceding rule, then (subject to the power of the Court to allow an amendment) the matter demurred to shall as between the parties to the demurrer be deemed to be struck out of the pleadings and the rights of the parties shall be the same as if it had not been pleaded. Striking out matter demurred to.

11. Where a demurrer is overruled the demurring party shall pay to the opposite party the costs occasioned by the demurrer unless the Court shall otherwise direct. Costs on unsuccessful demurrer.

12. Where a demurrer is overruled the Court may make such order and upon such terms as to the Court shall seem right for allowing the demurring party to raise by pleading any case he may be desirous to set up in opposition to the matter demurred to. Pleading over after unsuccessful demurrer.

13. A demurrer shall be entered for argument by delivering to the proper officer a memorandum of entry in the Form No. 29 in Appendix (C). Form of demurrer.

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## ORDER XXIX.

### DEFAULT OF PLEADING.

1. If the plaintiff, being bound to deliver a statement of claim, does not deliver the same within the time allowed for that purpose, the defendant may, at the expiration of that time, apply to the Court or a judge to dismiss the action with costs, for want of prosecution; and on hearing of such application the Dismissal of action for want of prosecution.

Court or judge may, if no statement of claim have been delivered, order the action to be dismissed accordingly, or may make such other order on such terms as to the Court or judge shall seem just.

Default by defendant in action of debt.

2. If the plaintiff's claim be only for a debt or liquidated demand, and the defendant does not, within the time allowed for that purpose, deliver a defence or demurrer, the plaintiff may, at the expiration of such time, enter final judgment for the amount claimed, with costs.

Where one of several defendants makes default.

3. When in any such action as in the last preceding rule mentioned there are several defendants, if one of them make default as mentioned in the last preceding rule, the plaintiff may enter final judgment against the defendant so making default, and issue execution upon such judgment without prejudice to his right to proceed with his action against the other defendants.

Default by defendant in action for unliquidated damages.

4. If the plaintiff's claim be for detention of goods and pecuniary damages, or either of them, and the defendant makes default as mentioned in Rule 2 the plaintiff may enter an interlocutory judgment against the defendant, and a writ of inquiry shall issue to assess the value of the goods, and the damages, or the damages only, as the case may be. But the Court or a judge may order that, instead of a writ of inquiry, the value and amount of damages, or either of them, shall be ascertained in any way in which any question arising in an action may be tried.

Where one of several defendants makes default.

5. When in any such action as in Rule 4 mentioned there are several defendants, if one of them make default as mentioned in Rule 2, the plaintiff may enter an interlocutory judgment against the defendant so making default, and proceed with his action against the others. And in such case, damages against the defendant making default shall be assessed at the same time with the trial of the action or issues therein against the other defendants, unless the Court or a judge shall otherwise direct.

Claim sounding in debt and damages.

6. If the plaintiff's claim be for a debt or liquidated demand, and also for detention of goods and pecuniary damages, or pecuniary damages only, and the defendant makes default as mentioned in Rule 2, the plaintiff may enter final judgment for the debt or liquidated demand, and also enter interlocutory judgment for the value of the goods and the damages

or the damages only, as the case may be, and proceed as mentioned in Rule 4.

7. In an action for the recovery of land, if the defendant makes default as mentioned in Rule 2, the plaintiff may enter a judgment that the person whose title is asserted in the writ of summons shall recover possession of the land, with his costs. In action for recovery of land.

8. Where the plaintiff has indorsed a claim for mesne profits, arrears of rent, or damages for breach of contract upon a writ for the recovery of land, if the defendant makes default as mentioned in Rule 2, or, if there be more than one defendant, some or one of the defendants make such default, the plaintiff may enter judgment against the defaulting defendant or defendants, and proceed as mentioned in Rules 4 and 5. Mesne profits.

9. In Probate actions, if any defendant make default in filing and delivering a defence or demurrer, the action may proceed, notwithstanding such default. In Probate actions.

10. In all other actions than those in the preceding rules of this Order mentioned, if the defendant makes default in delivering a defence or demurrer, the plaintiff may set down the action on motion for judgment, and such judgment shall be given as upon the statement of claim the Court shall consider the plaintiff to be entitled to. In other cases, motion for judgment.

11. Where, in any such action as mentioned in the last preceding rule, there are several defendants, then, if one of such defendants make such default as aforesaid, the plaintiff may either set down the action at once on motion for judgment against the defendant so making default, or may set it down against him at the time when it is entered for trial or set down on motion for judgment against the other defendants. Where one of several defendants makes default.

12. If the plaintiff does not deliver a reply or demurrer, or any party does not deliver any subsequent pleading, or a demurrer, within the period allowed for that purpose, the pleadings shall be deemed to be closed at the expiration of that period, and the statements of fact in the pleading last delivered shall be deemed to be admitted. Close of pleadings by default.

13. In any case in which issues arise in an action other than between plaintiff and defendant, if any party to any such issue makes default in delivering any pleading, the opposite party may apply to the Default by third party.

Court or a judge for such judgment, if any, as upon the pleadings he may appear to be entitled to. And the Court may order judgment to be entered accordingly, or may make such other order as may be necessary to do complete justice between the parties.

Setting  
aside judgment by  
default.

14. Any judgment by default, whether under this order or under any other of these rules may be set aside by the Court or a judge, upon such terms as to costs or otherwise as such Court or judge may think fit.

### ORDER XXX.

#### PAYMENT INTO COURT IN SATISFACTION.

Time for  
payment  
into Court.

1. Where any action is brought to recover a debt or damages, any defendant may at any time after service of the writ, and before or at the time of delivering his defence, or by leave of the Court or a judge at any later time, pay into Court a sum of money by way of satisfaction or amends. Payment into Court shall be pleaded in the defence, and the claim or cause of action in respect of which such payment shall be made shall be specified therein.

Notice of  
payment.

2. Such sum of money shall be paid to the proper officer, who shall give a receipt for the same. If such payment be made before delivering his defence the defendant shall thereupon serve upon the plaintiff a notice that he has paid in such money, and in respect of what claim, in the Form No. 5 in Appendix (B) hereto.

Payment  
out to  
plaintiff.

3. Money paid into Court as aforesaid may, unless otherwise ordered by a judge, be paid out to the plaintiff, or to his solicitor on the written authority of the plaintiff. No affidavit shall be necessary to verify the plaintiff's signature to such written authority unless specially required by the officer of the Court.

Notice to  
defendant of  
acceptance.

4. The plaintiff, if payment into Court is made before delivering a defence, may within four days after receipt of notice of such payment, or if such payment is first stated in a defence delivered then may before reply, accept the same in satisfaction of the causes of action in respect of which it is paid in ; in which case he shall give notice to the defendant

in the Form No. 6 in Appendix (B) hereto, and shall be at liberty, in case the sum paid in is accepted in satisfaction of the entire cause of action, to tax his costs, and, in case of non-payment within forty-eight hours, to sign judgment for his costs so taxed.

### ORDER XXXI.

#### DISCOVERY AND INSPECTION.

1. The plaintiff may, at the time of delivering his statement of claim, or at any subsequent time not later than the close of the pleadings, and a defendant may, at the time of delivering his defence, or at any subsequent time not later than the close of the pleadings, without any order for that purpose, and either party may at any time, by leave of the Court or a judge, deliver interrogatories in writing for the examination of the opposite party or parties, or any one or more of such parties, with a note at the foot thereof, stating which of such interrogatories each of such persons is required to answer: provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose.

Interrogatories,  
delivery of.

No order  
necessary.

2. The Court in adjusting the costs of the action shall at the instance of any party inquire or cause inquiry to be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing master or of the Court or judge that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories, and the answers thereto shall be borne by the party in fault.

Costs of  
improperly  
interrogating.

3. Interrogatories may be in the Form No. 7 in Appendix (B) hereto, with such variations as circumstances may require.

Form.

4. If any party to an action be a body corporate or a joint stock company, whether incorporated or not, or any other body of persons, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply at chambers for an order allowing him to deliver interrogatories to any member or officer of such corporation, company, or body, and an order may be made accordingly.

Interrogating  
officer of  
corporation.

Objection to answer taken in affidavit.

5. Any objection to answering any one or more of several interrogatories on the ground that it or they is or are scandalous or irrelevant, or not bonâ fide for the purpose of the action, or that the matters inquired into are not sufficiently material at that stage of the action, or on any other ground, may be taken in the affidavit in answer.

Application against unreasonable or scandalous interrogatory.

An application to set aside the interrogatories on the ground that they have been exhibited unreasonably or vexatiously, or to strike out any interrogatory or interrogatories on the ground that it or they is or are scandalous, may be made at chambers within four days after service of the interrogatories.

Time and mode of answer.

6. Interrogatories shall be answered by affidavit, to be filed within ten days, or within such other time as a judge may allow.

Answer when printed.

7. An affidavit in answer to interrogatories shall, unless otherwise ordered by a judge, if exceeding ten folios, be printed, and may be in the Form No. 8 in Appendix (B) hereto, with such variations as circumstances may require.

Sufficiency of answer, determination of.

8. [Repealed.]

9. No exception shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the Court or a judge, on motion or summons.

Failure to answer.

10. If any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the Court or a judge for an order requiring him to answer or to answer further, as the case may be. And an order may be made requiring him to answer, or answer further, either by affidavit, or by vivâ voce examination, as the judge may direct.

Production of documents on oath.

11. It shall be lawful for the Court or a judge, at any time during the pendency therein of any action or proceeding, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such action or proceeding, as the Court or judge shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just.

Discovery of documents.

12. Any party may, without filing any affidavit, apply to a judge for an order directing any other party to the action to make discovery on oath of the documents which are or have been in his possession



or power, relating to any matter in question in the action.

13. The affidavit to be made by a party against whom such order as is mentioned in the last preceding rule has been made, shall specify which, if any, of the documents therein mentioned he objects to produce, and it may be in the Form No. 9 in Appendix (B.) hereto, with such variations as circumstances may require. Affidavit of documents to specify objections

14. Every party to an action or other proceeding shall be entitled, at any time before or at the hearing thereof, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such action or proceeding, unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the action, or that he had some other sufficient cause for not complying with such notice. Inspection of documents referred to in pleading.

15. Notice to any party to produce any documents referred to in his pleading or affidavits shall be in the Form No. 10 in Appendix (B) hereto. Form of Notice.

16. The party to whom such notice is given shall, within two days from the receipt of such notice, if all the documents therein referred to have been set forth by him in such affidavit as is mentioned in Rule 13, or if any of the documents referred to in such notice have not been set forth by him in any such affidavit, then within four days from the receipt of such notice, deliver to the party giving the same a notice, stating a time within three days from the delivery thereof, at which the documents, or such of them as he does not object to produce, may be inspected at the office of his solicitor, and stating which, if any, of the documents he objects to produce, and on what ground. Such notice may be in the Form No. 11 in Appendix (B) hereto, with such variations as circumstances may require. Fixing of time for inspection.

17. If the party served with notice under Rule 15 omits to give such notice of a time for inspection, or objects to give inspection, the party desiring it may apply to a judge for an order for inspection. Notice.

Order for inspection.

Application  
for inspection  
in other  
cases by  
affidavit.

18. Every application for an order for inspection of documents shall be to a judge. And except in the case of documents referred to in the pleadings or affidavits of the party against whom the application is made, or disclosed in his affidavit of documents, such application shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party.

Reservation  
of question.

19. If the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the Court or a judge may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the action, or that for any other reason it is desirable that any issue or question in dispute in the action should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection.

Disobedi-  
ence of  
order.

20. If any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall be liable to attachment. He shall also, if a plaintiff, be liable to have his action dismissed for want of prosecution, and, if a defendant to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating may apply to the Court or a judge for an order to that effect, and an order may be made accordingly.

Foundation  
for attach-  
ment.

21. Service of an order for discovery or inspection made against any party on his solicitor shall be sufficient service to found an application for an attachment for disobedience to the order. But the party against whom the application for an attachment is made may show in answer to the application that he has had no notice or knowledge of the order.

Attachment  
of solicitor.

22. A solicitor upon whom an order against any party for discovery or inspection is served under the last rule, who neglects without reasonable excuse to give notice thereof to his client, shall be liable to attachment.

Use at trial  
of answers  
to interro-  
gatories.

23. Any party may, at the trial of an action or issue, use in evidence any one or more of the answers of the opposite party to interrogatories with-

out putting in the others: provided always, that in such case the judge may look at the whole of the answers, and if he shall be of opinion that any other of them are so connected with those put in that the last-mentioned answers ought not to be used without them, he may direct them to be put in.

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## ORDER XXXII.

### ADMISSIONS.

1. Any party to an action may give notice, by his own statement or otherwise, that he admits the truth of the whole or any part of the case stated or referred to in the statement of claim, defence, or reply of any other party. Notice to admit fact.

2. Either party may call upon the other party to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the action may be, unless at the hearing or trial the Court certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except where the omission to give the notice is, in the opinion of the taxing officer, a saving of expense. Notice to admit documents.

3. A notice to admit documents may be in the Form No. 12\* in Appendix (B) hereto. Form.

4. An affidavit of the solicitor or his clerk, of the due signature of any admissions made in pursuance of any notice to admit documents, and annexed to the affidavit, shall be sufficient evidence of such admissions. Evidence of admission.

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## ORDER XXXIII.

### INQUIRIES AND ACCOUNTS.

The Court or a judge may, at any stage of the proceedings in a cause or matter, direct any necessary inquiries or accounts to be made or taken, notwithstanding that it may appear that there is some special Preliminary accounts and inquiries.

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\* See p. 231.

or further relief sought for, or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner.

## ORDER XXXIV.

### QUESTIONS OF LAW.

Special case  
by agree-  
ment.

1. The parties may, after the writ of summons has been issued, concur in stating the questions of law arising in the action in the form of a special case for the opinion of the Court. Every such special case shall be divided into paragraphs numbered consecutively, and shall concisely state such facts and documents as may be necessary to enable the Court to decide the questions raised thereby. Upon the argument of such case the Court and the parties shall be at liberty to refer to the whole contents of such documents, and the Court shall be at liberty to draw from the facts and documents stated in any such special case any inference, whether of fact or law, which might have been drawn therefrom if proved at a trial.

Preliminary  
questions of  
law.

2. If it appear to the Court or a judge, either from the statement of claim or defence or reply or otherwise, that there is in any action a question of law, which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, or before any reference is made to a referee or an arbitrator, the Court or judge may make an order accordingly, and may direct such question of law to be raised for the opinion of the Court, either by special case or in such other manner as the Court or judge may deem expedient, and all such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed.

All special  
cases to be  
printed.

3. Every special case shall be printed by the plaintiff, and signed by the several parties or their solicitors, and shall be filed by the plaintiff. Printed copies for the use of the judges shall be delivered by the plaintiff.

Where mar-  
ried woman  
party.

4. No special case in an action to which a married woman, infant, or person of unsound mind is a party shall be set down for argument without leave of the Court or a judge, the application for which must be supported by sufficient evidence that the statements

contained in such special case, so far as the same affect the interest of such married woman, infant, or person of unsound mind, are true.

5. Either party may enter a special case for argument by delivering to the proper officer a memorandum of entry, in the Form No. 13 in Appendix (B) hereto, and also if any married woman, infant, or person of unsound mind be a party to the action, producing a copy of the order giving leave to enter the same for argument.

Entry of  
case for  
argument.

### ORDER XXXV.

#### PROCEEDINGS IN DISTRICT REGISTRIES.

1. Where an action proceeds in the district registry, all proceedings, except where by any of the rules of the Supreme Court it is otherwise provided, or the Court or a judge shall otherwise order, shall be taken in the district registry, down to and including final judgment, and every final judgment and every order for an account by reason of the default of the defendant, or by consent, shall be entered in the district registry in the proper book, in the same manner as a like judgment or order in an action proceeding in London would be entered in London.

Jurisdiction  
in registry.

Where the writ of summons is issued out of a district registry and the plaintiff is entitled to enter interlocutory judgment under Order XIII., Rule 6, or where the action proceeds in the district registry and the plaintiff is entitled to enter interlocutory judgment under Order XXIX., Rule 4 or 5, in either case such interlocutory judgment, and, when damages shall have been assessed, final judgment shall be entered in the district registry, unless the Court or judge shall otherwise order.

Where an action proceeds in the district registry, final judgment shall be entered in such registry, unless the judge at the trial or the Court or a judge shall otherwise order.

Entry of  
final judgment  
in  
registry.

Actions in the Queen's Bench, Common Pleas, and Exchequer Divisions shall be entered for trial with the associates and not in the district registries.

2. Subject to the foregoing rules, where an action proceeds in the district registry the judgment and all such orders therein as require to be entered, except

Entry of  
judgment in  
London.

orders made by the district registrar under the authority and jurisdiction vested in him under these rules, shall be entered in London, and an office copy of every judgment and order so entered shall be transmitted to the district registry to be filed with the proceedings in the action.

Issue of  
execution  
from  
registry.

3. Where an action proceeds in the district registry all writs of execution for enforcing any judgment or order therein shall issue from the district registry, unless the Court or a judge shall otherwise direct. Where final judgment is entered in the district registry costs shall be taxed in such registry unless the Court or a judge shall otherwise order.

Jurisdiction  
of district  
registrar.

4. Where an action proceeds in a district registry the district registrar may exercise all such authority and jurisdiction in respect of the action as may be exercised by a judge at chambers, except such as by these rules a master of the Queen's Bench, Common Pleas, or Exchequer Divisions is precluded from exercising.

5. Every application to a district registrar shall be made in the same manner in which applications at chambers are directed to be made by these rules.

Reference to  
judge.

6. If any matter appears to the district registrar proper for the decision of a judge, the registrar may refer the same to a judge, and the judge may either dispose of the matter or refer the same back to the registrar with such directions as he may think fit.

Appeal to  
judge.

7. Any person affected by an order or decision of a district registrar may appeal to a judge. Such appeal may be made notwithstanding that the order or decision was in respect of a proceeding or matter as to which the district registrar had jurisdiction only by consent. Such appeal shall be by summons within four days after the decision complained of, or such further time as may be allowed by a judge or the registrar.

Appeal no  
stay.

8. An appeal from a district registrar shall be no stay of proceedings unless so ordered by a judge or the registrar.

Control of  
registrar by  
Court.

9. Every district registrar and other officer of a district registry shall be subject to the orders and directions of the Court or a judge as fully as any other officer of the Court, and every proceeding in a district registry shall be subject to the control of the Court or a judge, as fully as a like proceeding in London.

10. Every reference to a judge by or appeal to a judge from a district registrar in any action in the Chancery Division shall be to the judge to whom the action is assigned. In Chancery Division.

11. In any action which would, under the foregoing rules, proceed in the district registry, any defendant may remove the action from the district registry as of right in the cases, and within the times following: Removal of action from registry by defendant as of right.

Where the writ is specially indorsed under Order III. Rule 6, and the plaintiff does not within four days after the appearance of such defendant give notice of an application for an order against him under Order XIV., then such defendant may remove the action as of right at any time after the expiration of such four days and before delivering a defence, and before the expiration of the time for doing so:

Where the writ is specially indorsed and the plaintiff has made such application as in the last paragraph mentioned, and the defendant has obtained leave to defend in manner provided by Order XIV., then such defendant may remove the action as of right at any time after the order giving him leave to defend, and before delivering a defence and before the expiration of the time for doing so:

Where the writ is not specially indorsed any defendant may remove the action as of right at any time after appearance, and before delivering a defence, and before the expiration of the time for doing so.

11A. In an Admiralty action in rem any person who may have duly intervened and appeared may remove an action from a district registry as of right. In action in rem.

12. Any defendant desirous to remove an action as of right under the last preceding rule may do so by serving upon the other parties to the action, and delivering to the district registrar, a notice, signed by himself or his solicitor, to the effect that he desires the action to be removed to London, and the action shall be removed accordingly: provided, that if the Court or a judge shall be satisfied that the defendant giving such notice is a merely formal defendant, or has no substantial cause to interfere in the conduct Mode of removal.

of the action, such Court or judge may order that the action may proceed in the district registry notwithstanding such notice.

Removal by order by either party.

13. In any case not provided for by the last two preceding rules, any party to an action proceeding in a district registry may apply to the Court or a judge, or to the district registrar, for an order to remove the action from the district registry to London, and such Court, judge, or registrar may make an order accordingly, if satisfied that there is sufficient reason for doing so, upon such terms, if any, as shall seem just.

Removal from London to registry.

Any party to an action proceeding in London may apply to the Court or a judge for an order to remove the action from London to any district registry, and such Court or judge may make an order accordingly, if satisfied that there is sufficient reason for doing so, upon such terms, if any, as shall seem just.

Transmission of documents on removal.

14. Whenever any proceedings are removed from the district registry to London the district registrar shall transmit to the proper officer of the High Court of Justice all original documents (if any) filed in the district registry, and a copy of all entries in the books of the district registry of the proceedings in the action.

15. Every district registrar shall account for and pay over to the Treasury all moneys paid into Court at the registry of which he is registrar, in such manner and at such times as may be from time to time directed by the Treasury.

## ORDER XXXVI.

### TRIAL.

Place of trial.  
Abolition of local venue.

1. There shall be no local venue for the trial of any action, but when the plaintiff proposes to have the action tried elsewhere than in Middlesex, he shall in his statement of claim name the county or place in which he proposes that the action shall be tried, and the action shall, unless a judge otherwise orders, be tried in the county or place so named. Where no place of trial is named in the statement of claim, the place of trial shall, unless a judge otherwise orders, be the county of Middlesex. Any order of a judge



as to such place of trial, may be discharged or varied by a Divisional Court of the High Court.

2. Actions shall be tried and heard either before a judge or judges, or before a judge sitting with assessors, or before a judge and jury, or before an official or special referee, with or without assessors.

Modes of trial.

3. Subject to the provisions of the following rules, the plaintiff may, with his reply, or at any time after the close of the pleadings, give notice of trial of the action, and thereby specify one of the modes mentioned in Rule 2; and the defendant may, upon giving notice within four days from the time of the service of the notice of trial, or within such extended time as a Court or judge may allow, to the effect that he desires to have the issues of fact tried before a judge and jury, be entitled to have the same so tried.

Notice of trial by plaintiff.

4. Subject to the provisions of the following rules, if the plaintiff does not within six weeks after the close of the pleadings, or within such extended time as a Court or judge may allow, give notice of trial, the defendant may, before notice of trial given by the plaintiff, give notice of trial, and thereby specify one of the modes mentioned in Rule 2; and in such case the plaintiff, on giving notice within the time fixed by Rule 3 that he desires to have the issues of fact tried before a judge and jury,\* be entitled to have the same so tried.

Notice of trial by defendant.

4A. The defendant, instead of giving notice of trial, may apply to the Court or judge to dismiss the action for want of prosecution; and on the hearing of such application, the Court or a judge may order the action to be dismissed accordingly, or may make such other order, and on such terms, as to the Court or judge may seem just.

Dismissing action for want of prosecution.

5. In any case in which neither the plaintiff nor defendant has given notice under the preceding rules that he desires to have the issues of fact tried before a judge and jury, or in any case within the 57th section of the Act, if the plaintiff or defendant desires to have the action tried in any other mode than that specified in the notice of trial, he shall apply to the Court or a judge for an order to that effect, within four days from the time of the service of the notice of trial, or within such extended time as a Court or judge may allow.

Change of mode of trial.

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\* The word "shall" seems to have been left out here.

**Trial of  
different  
questions  
by different  
modes.**

6. Subject to the provisions of the preceding rules, the Court or a judge may, in any action at any time, or from time to time, order that different questions of fact arising therein be tried by different modes of trial, or that one or more questions of fact be tried before the others, and may appoint the place or places for such trial or trials, and in all cases may order that one or more issues of fact be tried before any other or others.

**Trial before  
more judges  
than one.**

7. Every trial of any question or issue of fact by a jury shall be held before a single judge, unless such trial be specially ordered to be held before two or more judges.

**Contents of  
notice of  
trial.**

8. Notice of trial shall state whether it is for the trial of the action or of issues therein; and in actions in the Queen's Bench, Common Pleas, and Exchequer Divisions, the place and day for which it is to be entered for trial. It may be in the Form No. 14 in Appendix (B), with such variations as circumstances may require.

**Length of  
notice of  
trial.**

9. Ten days' notice of trial shall be given, unless the party to whom it is given has consented to take short notice of trial; and shall be sufficient in all cases, unless otherwise ordered by the Court or a judge. Short notice of trial shall be four days' notice.

**Short  
notice.**

10. Notice of trial shall be given before entering the action for trial.

**Lapse of  
notice of  
trial.**

10A. Unless within six days after notice of trial is given the cause shall be entered for trial by one party or the other, the notice of trial shall be no longer in force. This rule is not to apply in any case in which notice of trial has been already given,\* or to trials not in London or Middlesex.

**For London  
or Middle-  
sex.**

11. Notice of trial for London or Middlesex shall not be or operate as for any particular sittings; but shall be deemed to be for any day after the expiration of the notice on which the action may come on for trial in its order upon the list.

**Elsewhere**

12. Notice of trial elsewhere than in London or Middlesex shall be deemed to be for the first day of the then next assizes at the place for which notice of trial is given.

**Counter-  
mand of  
notice of  
trial.**

13. No notice of trial shall be countermanded, except by consent, or by leave of the Court or a judge,

\* That is, before the 1st December, 1875.

which leave may be given subject to such terms as to costs, or otherwise, as may be just.

14. If the party giving notice of trial for London or Middlesex omits to enter the action for trial on the day or day after giving notice of trial, the party to whom notice has been given may, unless the notice has been countermanded under the last rule, within four days enter the action for trial.

Entry for trial in town

15. If notice of trial is given for elsewhere than in London or Middlesex, either party may enter the action for trial. If both parties enter the action for trial, it shall be tried in the order of the plaintiff's entry.

Elsewhere,

16. The list or lists of actions for trial at the sittings in London and Middlesex respectively shall be prepared, and the actions shall be allotted for trial without reference to the division of the High Court to which such actions may be attached.

List of actions for trial.

17. The party entering the action for trial shall deliver to the officer two copies of the whole of the pleadings in the action, one of which shall be for the use of the judge at the trial. Such copies shall be in print, except as to such parts, if any, of the pleadings as are by these rules permitted to be written.

Copy of pleadings for judge.

18. If, when an action is called on for trial, the plaintiff appears, and the defendant does not appear, then the plaintiff may prove his claim, so far as the burden of proof lies upon him.\*

Default of appearance at trial.

19. If, when an action is called on for trial, the defendant appears, and the plaintiff does not appear, the defendant, if he has no counter-claim, shall be entitled to judgment dismissing the action, but if he has a counter-claim, then he may prove such claim so far as the burden of proof lies upon him.

20. Any verdict or judgment obtained where one party does not appear at the trial, may be set aside by the Court or a judge upon such terms as may seem fit, upon an application made within six days after the trial; such application may be made either at the assizes or in Middlesex.

Setting aside judgment in default of appearance

21. The judge may, if he think it expedient for the interests of justice, postpone or adjourn the trial for such time, and upon such terms, if any, as he shall think fit.

Adjournment.

\* There is no necessity to prove notice of trial on default of appearance. (*James v. Crow*, 47 L. J. Ch. 200.)

Direction of  
judge as to  
judgment.

22. Upon the trial of an action the judge may, at or after the trial, direct that judgment be entered for any or either party, or adjourn the case for further consideration, or leave any party to move for judgment. No judgment shall be entered after a trial without the order of a Court or judge.

Entry by  
associate of  
findings.

23. Upon every trial at the assizes, or at the London and Middlesex sitting of the Queen's Bench, Common Pleas, or Exchequer Division, where the officer present at the trial is not the officer by whom judgments ought to be entered, the associate shall enter all such findings of fact as the judge may direct to be entered, and the directions, if any, of the judge as to judgment, and the certificates, if any, granted by the judge, in a book to be kept for the purpose.

Certificate  
of associate.

24. If the judge shall direct that any judgment be entered for any party absolutely, the certificate of the associate to that effect shall be a sufficient authority to the proper officer to enter judgment accordingly. The certificate may be in the Form No. 15 in Appendix (B) hereto.

25. If the judge shall direct that any judgment be entered for any party subject to leave to move, judgment shall be entered accordingly upon the production of the associate's certificate.

Power to  
direct trial  
without  
jury.

26. The Court or a judge may, if it shall appear desirable, direct a trial without a jury of any question or issue of fact, or partly of fact, and partly of law, arising in any cause or matter which previously to the passing of the Act could, without any consent of parties, be tried without a jury.

Power to  
direct trial  
with jury.

27. The Court or a judge may, if it shall appear, either before or at the trial, that any issue of fact can be more conveniently tried before a jury, direct that such issue shall be tried by a judge with a jury.

Trials with  
assessors.

28. Trials with assessors shall take place in such manner and upon such terms as the Court or a judge shall direct.

Power to  
direct trial  
by judge of  
assize.

29. In any cause the Court or a judge of the division to which the cause is assigned may, at any time, or from time to time, order the trial and determination of any question or issue of fact, or partly of fact and partly of law, by any commissioner or commissioners appointed in pursuance of the 29th section of the said Act or at the sittings to be held in Middlesex or London, and such question or issue shall be tried and determined accordingly.

29A. Where in any action in the Chancery Division the action or any question at issue in the action is ordered to be tried before any commissioner or commissioners of assize, or at the London or Middlesex sittings of any division other than the Chancery Division, the order directing such trial shall state on its face the reason for which it is expedient that the action, question, or issue should be so tried, and should not be tried in the Chancery Division.

Order in  
Chancery  
Division to  
state reason.

29A.\* The business to be referred to the official referees appointed under the Supreme Court of Judicature Act, 1873, shall be distributed among such official referees in rotation by the clerks to the registrars of the Supreme Court, Chancery Division, in like manner in all respects as the business referred to conveyancing counsel appointed under the Act of the 15th and 16th Vict., cap. 80, section 41, is directed to be distributed by the second of the Consolidated General Orders of the Court of Chancery.

Business of  
official  
referees.

29B. When an order shall have been made referring any business to the official referee in rotation, such order, or a duplicate of it, shall be produced to the registrar's clerk, whose duty it is to make such distribution as aforesaid; and such clerk shall (except in the case provided for by Rule 29c of this order) indorse thereon a note specifying the name of the official referee in rotation to whom such business is to be referred; and the order so indorsed shall be a sufficient authority for the official referee to proceed with the business so referred.

Distribution  
of business  
by re-  
gistrar's  
clerk.

29C. The last two preceding rules of this order are not to interfere with the power of the Court, or of the judge at chambers, to direct or transfer a reference to any one in particular of the said official referees, where it appears to the Court or judge to be expedient; but every such reference or transfer shall be recorded in the manner mentioned in Rule 2 of the second of the said Consolidated General Orders, and a note to that effect be indorsed on the order of reference or transfer; and in case any such reference or transfer shall have been or shall be made to any one in particular of the said referees, then the clerk in making the distribution of the business according to such rotation as aforesaid shall have regard to any such reference or transfer.

Reference to  
particular  
referee.

\* So numbered in duplicate

**Trial before referee.**

30. Where any cause or matter, or any question in any cause or matter, is referred to a referee, he may, subject to the order of the Court or a judge, hold the trial at or adjourn it to any place which he may deem most convenient, and have any inspection or view, either by himself or with his assessors (if any), which he may deem expedient for the better disposal of the controversy before him. He shall, unless otherwise directed by the Court or a judge, proceed with the trial *de die in diem*, in a similar manner as in actions tried by a jury.

**Evidence before referee.**

31. Subject to any order to be made by the Court or judge ordering the same, evidence shall be taken at any trial before a referee, and the attendance of witnesses may be enforced by subpoena, and every such trial shall be conducted in the same manner, as nearly as circumstances will admit, as trials before a judge of the High Court, but not so as to make the tribunal of the referee a public court of justice.

**Tribunal not public court.**

**Authority of referee.**

32. Subject to any such order as last aforesaid, the referee shall have the same authority in the conduct of any reference or trial as a judge of the High Court when presiding at any trial before him.

**No authority to commit.**

33. Nothing in these rules contained shall authorise any referee to commit any person to prison or to enforce any order by attachment or otherwise.

**Statement of case by referee.**

34. The referee may, before the conclusion of any trial before him, or by his report under the reference made to him, submit any question arising therein for the decision of the Court, or state any facts specially with power to the Court to draw inferences therefrom, and in any such case the order to be made on such submission or statement shall be entered as the Court may direct; and the Court shall have power to require any explanation or reasons from the referee, and to remit the cause or matter, or any part thereof, for re-trial or further consideration to the same or any other referee; or the Court may decide the question referred to any referee on the evidence taken before him, either with or without additional evidence as the Court may direct.

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## ORDER XXXVII.

## EVIDENCE GENERALLY.

1. In the absence of any agreement between the parties,\* and subject to these rules, the witnesses at the trial of any action or at any assessment of damages, shall be examined *viva voce* and in open Court, but the Court or a judge may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the Court or judge may think reasonable, or that any witness whose attendance in Court ought for some sufficient cause to be dispensed with, be examined by interrogatories or otherwise before a commissioner or examiner; provided that where it appears to the Court or judge that the other party *bonâ fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.

Evidence at trial to be in general oral.

Proof of particular facts by affidavit.

2. Upon any motion, petition, or summons evidence may be given by affidavit; but the Court or a judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit.

Evidence on motion, &c., by affidavit.

3. Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted. The costs of every affidavit which shall unnecessarily set forth matters of hearsay, or argumentative matter, or copies of or extracts from documents, shall be paid by the party filing the same.

Hearsay excluded from affidavits.

Costs.

4. The Court or a judge may, in cause or matter, where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before any officer of the Court, or any other

Examination before officer of Court, by order.

\* The guardian *ad litem* may consent to the evidence being taken by affidavit on behalf of the infant (*Fryer v. Wiseman*, 45 L. J. Ch. 199), and in the Chancery Division agreements to take evidence by affidavit are encouraged (*Patterson v. Wooler*, 45 L. J. Ch. 274; L. R. 2 Ch. D. 586). The agreement must be a formal written agreement, and cannot be extracted from a correspondence (*New Westminster Brewery Co. v. Hannah*, L. R. 1 Ch. D. 278).

person or persons, and at any place, of any witness or person, and may order any deposition so taken to be filed in the Court, and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the Court or a judge may direct.

### ORDER XXXVIII.

#### EVIDENCE BY AFFIDAVIT.

Time for  
filing affida-  
vits, by  
plaintiff.

1. Within fourteen days after a consent for taking evidence by affidavit as between the plaintiff and the defendant has been given, or within such time as the parties may agree upon, or a judge in chambers may allow, the plaintiff shall file his affidavits and deliver to the defendant or his solicitor a list thereof.

By defen-  
dant.

2. The defendant within fourteen days after delivery of such list, or within such time as the parties may agree upon, or a judge in chambers may allow, shall file his affidavits and deliver to the plaintiff or his solicitor a list thereof.

Affidavits in  
reply.

3. Within seven days after the expiration of the said fourteen days, or such other time as aforesaid, the plaintiff shall file his affidavits in reply, which affidavits shall be confined to matters strictly in reply, and shall deliver to the defendant or his solicitor a list thereof.

Cross-ex-  
amination  
of deponent.

4. When the evidence is taken by affidavit, any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party, may serve upon the party by whom such affidavit has been filed, a notice in writing, requiring the production of the deponent for cross-examination before the Court at the trial, such notice to be served at any time before the expiration of fourteen days next after the end of the time allowed for filing affidavits in reply, or within such time as in any case the Court or a judge may specially appoint; and unless such deponent is produced accordingly, his affidavit shall not be used as evidence unless by the special leave of the Court. The party producing such deponent for cross-examination shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production.

Notice for  
production  
of deponent.

Compelling  
attendance  
of deponent.

5. The party to whom such notice as is mentioned in the last preceding rule is given, shall be entitled to compel the attendance of the deponent for cross-



examination in the same way as he might compel the attendance of a witness to be examined.

6. When the evidence in any action is under this Order taken by affidavit, such evidence shall be printed, and the notice of trial shall be given at the same time or times after the close of the evidence as in other cases is by these rules provided after the close of the pleadings. Printing of affidavits.

### ORDER XXXIX.

#### MOTION FOR NEW TRIAL.

1. Where, in an action in the Queen's Bench, Common Pleas or Exchequer Division, there has been a trial by a jury, any application for a new trial shall be to a Divisional Court. And where the trial has been by a judge without a jury, the application for a new trial shall be to the Court of Appeal. To whom motion is to be made.

1A. Applications for new trials shall be by motion calling on the opposite party to show cause at the expiration of eight days from the date of the order or so soon after as the case can be heard, why a new trial should not be directed. Such motion shall be made within the times following, unless the Court or a judge shall enlarge the time :— Time within which motion must be made.

An application to a Divisional Court for a new trial, if the trial has taken place in London or Westminster, shall be made within four days after the trial, or on the first subsequent day on which a Divisional Court to which the application may be made shall have actually sat to hear motions. If the trial has taken place elsewhere than in London or Middlesex, the motion shall be made within seven days after the last day of sitting on the circuit for England and Wales during which the action shall have been tried or within the first four days of the next following sittings if such day occurs during or within a week immediately before a vacation.\*

2. A copy of such order shall be served on the opposite party within four days from the time of the same being made. Service of copy of order.

3. A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, unless in the opinion of the Restrictions upon grants of new trial.

\* This rule does not apply to remitted cases tried in the County Court (*London v. Raffey*, 47 L. J. Q. B. 16; L. R. 3 Q. B. D. 81).

Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial of the action; and if it appear to such Court that such wrong or miscarriage affects part only of the matter in controversy, the Court may give final judgment as to part thereof, and direct a new trial as to the other part only.

New trial on particular question.

4. A new trial may be ordered on any question in an action, whatever be the grounds for the new trial, without interfering with the finding or decision upon any other question.

Order to show cause to be stay.

5. An order to show cause shall be a stay of proceedings in the action, unless the Court shall order that it shall not be so as to the whole or any part of the action.

## ORDER XL.

### MOTION FOR JUDGMENT.

Judgment by motion where not otherwise.

1. Except where by the act or by these rules it is provided that judgment may be obtained in any other manner, the judgment of the Court shall be obtained by motion for judgment.

Notice to opposite party where leave reserved.

2. Where at the trial of an action the judge or a referee has ordered that any judgment be entered subject to leave to move, the party to whom leave has been reserved shall set down the action on motion for judgment, and give notice thereof to the other parties within the time limited by the judge in reserving leave, or if no time has been limited, within ten days after the trial. The notice of motion shall state the grounds of the motion and the relief sought, and that the motion is pursuant to leave reserved.

Notice to opposite party where no leave reserved.

3. Where at the trial of an action the judge or referee abstains from directing any judgment to be entered, the plaintiff may set down the action on motion for judgment. If he does not so set it down and give notice thereof to the other parties within ten days after the trial, any defendant may set down the action on motion for judgment and give notice thereof to the other parties.

Appeal against judgment entered on findings.

4. Where at or after the trial of an action by a jury the judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment, and enter any other judgment, on the ground that the judgment directed to be entered is wrong by reason of the judge having

caused the finding\* to be wrongly entered with reference to the finding of the jury upon the question or questions submitted to them.

Where, at or after the trial of any action before a judge, the judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment, and to enter any other judgment, upon the ground that upon the finding as entered the judgment so directed is wrong. Where no jury.

An application under this Rule shall be to the Court of Appeal.

5. Where at the trial of an action a referee has directed that any judgment be entered, any party may, without any leave reserved, move to set aside such judgment, and to enter any other judgment, on the ground that upon the finding as entered the judgment so directed is wrong. Before referee.

6. [Repealed.]

7. Where issues have been ordered to be tried, or issues or questions of fact to be determined in any manner, the plaintiff may set down the action on motion for judgment as soon as such issues or questions have been determined. If he does not so set it down, and give notice thereof to the other parties within ten days after his right so to do has arisen, then after the expiration of such ten days any defendant may set down the action on motion for judgment, and give notice thereof to the other parties. Motion for judgment where issues ordered to be tried.

8. Where issues have been ordered to be tried, or issues or questions of fact to be determined in any manner, and some only of such issues or questions of fact have been tried or determined, any party who considers that the result of such trial or determination renders the trial or determination of the others of them unnecessary, or renders it desirable that the trial or determination thereof should be postponed, may apply to the Court or a judge for leave to set down the action on motion for judgment, without waiting for such trial or determination. And the Court or judge may, if satisfied of the expediency thereof, give such leave, upon such terms; if any, as shall appear just, and may give any directions which may appear desirable as to postponing the trial of the other questions of fact. Where some only of issues have been tried.

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\* Que "judgment."

Limitation  
of time for  
motion for  
judgment.

9. No action shall, except by leave of the Court or a judge, be set down on motion for judgment after the expiration of one year from the time when the party seeking to set down the same first became entitled so to do.

Postponing  
judgment.

10. Upon a motion for judgment, or for a new trial, the Court may, if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly, or may, if it shall be of opinion that it has not sufficient materials before it to enable it to give judgment, direct the motion to stand over for further consideration, and direct such issues or questions to be tried or determined, and such accounts and inquiries to be taken and made as it may think fit.

Anticipa-  
tory judg-  
ment.

11. Any party to an action may at any stage thereof apply to the Court or a judge for such order as he may, upon any admissions of fact in the pleadings, be entitled to, without waiting for the determination of any other question between the parties.\* The foregoing rules of this order shall not apply to such applications, but any such application may be made by motion, so soon as the right of the party applying to the relief claimed has appeared from the pleadings. The Court or a judge may, on any such application, give such relief, subject to such terms, if any, as such Court or judge may think fit.

## ORDER XLI.

### ENTRY OF JUDGMENT.

Entry of  
judgment  
by officer.

1. Every judgment shall be entered by the proper officer in the book to be kept for the purpose. The party entering the judgment shall deliver to the officer a copy of the whole of the pleadings in the action other than any petition or summons; such copy shall be in print, except such parts, if any, of the pleadings as are by these rules permitted to be written: provided that no copy need be delivered of any pleading, a copy of which has been delivered on

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\* This rule is confined to an order for relief, and does not entitle a defendant to have the action dismissed upon admissions in pleadings (*Litton v. Litton*, 46 L. J. Ch. 64; L. R. 3 Ch. D. 793).

entering any previous judgment in such action. The forms in Appendix (D)\* hereto may be used, with such variations as circumstances may require.

2. Where any judgment is pronounced by the Court or a judge in Court, the entry of the judgment shall be dated as of the day on which such judgment is pronounced, and the judgment shall take effect from that date. Date of entry where judgment is pronounced in Court.

3. In all cases not within the last preceding rule, the entry of judgment shall be dated as of the day on which the requisite documents are left with the proper officer for the purpose of such entry, and the judgment shall take effect from that date. Date of entry in other cases.

4. Where under the act or these rules, or otherwise, it is provided that any judgment may be entered or signed upon the filing of any affidavit or production of any document, the officer shall examine the affidavit or document produced, and if the same be regular, and contain all that is by law required, he shall enter judgment accordingly. Entry of judgment upon filing affidavit.

5. Where by the act or these rules, or otherwise, any judgment may be entered pursuant to any order or certificate, or return to any writ, the production of such order or certificate sealed with the seal of the Court, or of such return, shall be a sufficient authority to the officer to enter judgment accordingly. Entry of judgment upon certificate, &c.

6. Any judgment of nonsuit, unless the Court or a judge otherwise directs, shall have the same effect as a judgment upon the merits for the defendant; but in any case of mistake, surprise, or accident, any judgment of nonsuit may be set aside on such terms, as to payment of costs and otherwise, as to the Court or a judge shall seem just. Judgment of nonsuit final.

## ORDER XLII.

### EXECUTION.

1. A judgment for the recovery by or payment to any person of money may be enforced by any of the modes by which a judgment or decree for the payment of money of any court whose jurisdiction is transferred by the said act might have been enforced at the time of the passing thereof. For recovery of money.

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\* See pp. 233, 237, 240.

- For pay-  
ment into  
Court. 2. A judgment for the payment of money into Court may be enforced by writ of sequestration, or in cases in which attachment is authorized by law, by attachment.
- For recovery  
of land. 3. A judgment for the recovery or for the delivery of the possession of land may be enforced by writ of possession.
- For recovery  
of property  
other than  
land or  
money. 4. A judgment for the recovery of any property other than land or money may be enforced :—  
By writ for the delivery of the property.  
By writ of attachment.  
By writ of sequestration.
- Attach-  
ment. 5. A judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment, or by committal.
- Meaning of  
"writ of ex-  
ecution." 6. In these rules the term "writ of execution" shall include writs of fieri facias, capias, elegit, sequestration, and attachment, and all subsequent writs that may issue for giving effect thereto. And the term "issuing execution against any party" shall mean the issuing of any such process against his person or property as under the preceding rules of this Order shall be applicable to the case.
- Execution  
of contin-  
gent judg-  
ment. 7. Where a judgment is to the effect that any party is entitled to any relief subject to or upon the fulfilment of any condition or contingency, the party so entitled may, upon the fulfilment of the condition or contingency, and demand made upon the party against whom he is entitled to relief, apply to the Court or a judge for leave to issue execution against such party. And the Court or judge may, if satisfied that the right to relief has arisen according to the terms of the judgment, order that execution issue accordingly, or may direct that any issue or question necessary for the determination of the rights of the parties be tried in any of the ways in which questions arising in any action may be tried.
- Execution  
against  
partners. 8. Where a judgment is against partners in the name of the firm, execution may issue in manner following :—  
(a.) Against any property of the partners as such :  
(b.) Against any person who has admitted on the pleadings that he is, or has been, adjudged to be a partner :  
(c.) Against any person who has been served, as

a partner, with the writ of summons, and has failed to appear.

If the party who has obtained judgment claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the Court or a judge for leave so to do; and the Court or judge may give such leave if the liability be not disputed; or if such liability be disputed, may order that the liability of such person be tried and determined in any manner in which any issue or question in an action may be tried and determined.

9. No writ of execution shall be issued without the production to the officer by whom the same should be issued of the judgment upon which the writ of execution is to issue, or an office copy thereof, showing the date of entry. And the officer shall be satisfied that the proper time has elapsed to entitle the judgment creditor to execution.

Production of judgment before issue of execution.

10. No writ of execution shall be issued without the party issuing it, or his solicitor, filing a præcipe for that purpose. The præcipe shall contain the title of the action, the reference to the record, the date of the judgment and of the order, if any, directing the execution to be issued, the names of the parties against whom, or of the firms against whose goods, the execution is to be issued, and shall be signed by or on behalf of the solicitor of the party issuing it, or by the party issuing it, if he do so in person. The forms in Appendix (E) hereto may be used, with such variations as circumstances may require.

Filing of præcipe.

Contents of præcipe.

11. Every writ of execution shall be indorsed with the name and place of abode or office of business of the solicitor actually suing out the same, and when the solicitor actually suing out the writ shall sue out the same as agent for another solicitor, the name and place of abode of such other solicitor shall also be indorsed upon the writ; and in case no solicitor shall be employed to issue the writ, then it shall be indorsed with a memorandum expressing that the same has been sued out by the plaintiff or defendant in person, as the case may be, mentioning the city, town or parish, and also the name of the hamlet, street and number of the house of such plaintiff's or defendant's residence, if any such there be.

Solicitor's name, &c. to be indorsed on writ of execution.

Forms.

12. Every writ of execution shall bear the date of the day on which it is issued. The forms in Appendix (F)\* hereto may be used, with such variations as circumstances may require.

Poundage fees.

13. In every case of execution the party entitled to execution may levy the poundage, fees and expenses of execution, over and above the sum recovered.

Indorsement of writ with direction to sheriff to levy interest.

14. Every writ of execution for the recovery of money shall be indorsed with a direction to the sheriff or other officer or person to whom the writ is directed, to levy the money really due and payable and sought to be recovered under the judgment, stating the amount, and also to levy interest thereon, if sought to be recovered, at the rate of 4l. per cent. per annum from the time when the judgment was entered up, provided that in cases where there is an agreement between the parties that more than 4l. per cent. interest shall be secured by the judgment, then the indorsement may be accordingly to levy the amount of interest so agreed.

Fieri facias.

15. Every person to whom any sum of money or any costs shall be payable under a judgment, shall, immediately after the time when the judgment was duly entered, be entitled to sue out one or more writ or writs of fieri facias or one or more writ or writs of elegit to enforce payment thereof, subject nevertheless as follows :

Elegit.

(a.) If the judgment is for payment within a period therein mentioned, no such writ as aforesaid shall be issued until after the expiration of such period.

Stay of execution.

(b.) The Court or judge at the time of giving judgment, or the Court or a judge afterwards, may give leave to issue execution before, or may stay execution until any time after the expiration of the periods hereinbefore prescribed.

Renewal of writ of execution.

16. A writ of execution if unexecuted shall remain in force for one year only from its issue, unless renewed in the manner hereinafter provided ; but such writ may, at any time before its expiration, by leave of the Court or a judge, be renewed, by the party issuing it, for one year from the date of such renewal,

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\* See p. 234.



and so on from time to time during the continuance of the renewed writ, either by being marked with a seal of the Court bearing the date of the day, month, and year of such renewal, or by such party giving a written notice of renewal to the sheriff, signed by the party or his attorney, and bearing the like seal of the Court; and a writ of execution so renewed shall have effect, and be entitled to priority, according to the time of the original delivery thereof.

17. The production of a writ of execution, or of the notice of renewing the same, purporting to be marked with such seal as in the last preceding rule mentioned, showing the same to have been renewed, shall be sufficient evidence of its having been so renewed. Evidence of renewal.

18. As between the original parties to a judgment, execution may issue at any time within six years from the recovery of the judgment. Time for execution.

19. Where six years have elapsed since the judgment, or any change has taken place by death or otherwise in the parties entitled or liable to execution, the party alleging himself to be entitled to execution may apply to the Court or a judge for leave to issue execution accordingly. And such Court or judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties, shall be tried in any of the ways in which any question in an action may be tried. And in either case such Court or judge may impose such terms, as to costs or otherwise, as shall seem just. Execution by leave, after six years from judgment.

20. Every order of the Court or a judge, whether in an action, cause or matter, may be enforced in the same manner as a judgment to the same effect. Enforcement of order.

21. In cases other than those mentioned in Rule 18 any person not being a party in an action, who obtains any order or in whose favour any order is made, shall be entitled to enforce obedience to such order by the same process as if he were a party to the action; and any person not being a party in an action, against whom obedience to any judgment or order may be enforced, shall be liable to the same process for enforcing obedience to such judgment or order as if he were a party to the action. Execution by and against other than original parties to judgment.

22. No proceeding by *audita querela* shall hereafter be used; but any party against whom judgment Audita querela.

has been given may apply to the Court or a judge for a stay of execution or other relief against such judgment, upon the ground of facts which have arisen too late to be pleaded ; and the Court or judge may give such relief and upon such terms as may be just.

Savings.

23. Nothing in any of the rules of this Order shall take away or curtail any right heretofore existing to enforce or give effect to any judgment or order in any manner or against any person or property whatsoever.

Order of writs

24. Nothing in this Order shall affect the order in which writs of execution may be issued.

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### ORDER XLIII.

#### WRITS OF FIERI FACIAS AND ELEGIT.

Procedure in fi. fa. and elegit unaffected.

1. Writs of fieri facias and of elegit shall have the same force and effect as the like writs have heretofore had, and shall be executed in the same manner in which the like writs have heretofore been executed.

Writs in aid of fi. fa. and elegit.

2. Writs of venditioni exponas, distringas nuper vicecomitem, fieri facias de bonis ecclesiasticis, sequestrari facias de bonis ecclesiasticis, and all other writs in aid of a writ of fieri facias or of elegit, may be issued and executed in the same cases and in the same manner as heretofore.

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### ORDER XLIV.

#### ATTACHMENT.

Attachment.

1. A writ of attachment shall have the same effect as a writ of attachment issued out of the Court of Chancery has heretofore had.

Leave required.

2. No writ of attachment shall be issued without the leave of the Court or a judge, to be applied for on notice to the party against whom the attachment is to be issued.

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### ORDER XLV.

#### ATTACHMENT OF DEBTS.

Order for oral exami-

1. Where a judgment is for the recovery by or payment to any person of money, the party entitled

to enforce it may apply to the Court or a judge for an order that the judgment debtor be orally examined as to whether any and what debts are owing to him, before an officer of the Court, or such other person as the Court or judge shall appoint; and the Court or judge may make an order for the examination of such judgment debtor, and for the production of any books or documents.

nation of judgment debtor as to debts due to him.

2. The Court or a judge may, upon the ex parte application of such judgment creditor, either before or after such oral examination, and upon affidavit by himself or his solicitor stating that judgment has been recovered, and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment debtor, and is within the jurisdiction, order that all debts owing or accruing from such third person (hereinafter called the garnishee) to the judgment debtor shall be attached to answer the judgment debt; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the Court or a judge or an officer of the Court as such Court or judge shall appoint, to show cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt.

Order for attachment of debts due to judgment debtor.

3. Service of an order that debts due or accruing to the judgment debtor shall be attached, or notice thereof to the garnishee, in such manner as the Court or judge shall direct shall bind such debts in his hands.

Order for attachment to bind debts.

4. If the garnishee does not forthwith pay into court the amount due from him to the judgment debtor, or an amount equal to the judgment debt, and does not dispute the debt due or claimed to be due from him to the judgment debtor, or if he does not appear upon summons, then the Court or judge may order execution to issue, and it may issue accordingly, without any previous writ or process, to levy the amount due from such garnishee, or so much thereof as may be sufficient to satisfy the judgment debt.

Issue of execution on garnishee.

5. If the garnishee disputes his liability, the Court or judge, instead of making an order that execution shall issue, may order that any issue or question necessary for determining his liability be tried or determined in any manner in which any

Determination of liability where disputed.

issue or question in an action may be tried or determined.

Lien of third person on debt sought to be attached.

6. Whenever in proceedings to obtain an attachment of debts it is suggested by the garnishee that the debt sought to be attached belongs to some third person, or that any third person has a lien or charge upon it, the Court or judge may order such third person to appear, and state the nature and particulars of his claim upon such debt.

Judge may bar claim of third person.

7. After hearing the allegations of such third person under such order, and of any other person whom by the same or any subsequent order the Court or judge may order to appear, or in case of such third person not appearing when ordered, the Court or judge may order execution to issue to levy the amount due from such garnishee, or any issue or question to be tried or determined according to the preceding rules of this order, and may bar the claim of such third person, or make such other order as such Court or judge shall think fit, upon such terms, in all cases, with respect to the lien or charge (if any) of such third person, and to costs, as the Court or judge shall think just and reasonable.

Garnishee discharged.

8. Payment made by or execution levied upon the garnishee under any such proceeding as aforesaid shall be a valid discharge to him as against the judgment debtor, to the amount paid or levied, although such proceeding may be set aside, or the judgment reversed.

Debt attachment book.

9. There shall be kept by the proper officer a debt attachment book, and in such book entries shall be made of the attachment and proceedings thereon, with names, dates, and statements of the amount recovered, and otherwise; and copies of any entries made therein may be taken by any person upon application to the proper officer.

Costs.

10. The costs of any application for an attachment of debts, and of any proceedings arising from or incidental to such application, shall be in the discretion of the Court or a judge.

## ORDER XLVI.

### CHARGING OF STOCK OR SHARES AND DISTRINGAS.

Order charging stock.

1. An order charging stock or shares may be made by any divisional Court or by any judge, and the

proceedings for obtaining such order shall be such as are directed, and the effect shall be such as is provided by 1 & 2 Vict. c. 110, ss. 14 and 15, and 3 & 4 Vict. c. 82, s. 1.

2. Any person claiming to be interested in any stock transferable at the Bank of England standing in the name of any other person may sue out a writ of distringas pursuant to the statute 5 Vict. c. 8,\* as heretofore. Such writ to be issued out of any office of the High Court in London, where writs of summons are issued.

### ORDER XLVII.

#### WRIT OF SEQUESTRATION.

Where any person is by any judgment directed to pay money into Court or to do any other act in a limited time, and after due service of such judgment refuses or neglects to obey the same according to the exigency thereof, the person prosecuting such judgment shall, at the expiration of the time limited for the performance thereof, be entitled, without obtaining any order for that purpose, to issue a writ of sequestration against the estate and effects of such disobedient person. Such writ of sequestration shall have the same effect as a writ of sequestration in Chancery has heretofore had, and the proceeds of such sequestration may be dealt with in the same manner as the proceeds of writs of sequestration have heretofore been dealt with by the Court of Chancery.

### ORDER XLVIII.

#### WRIT OF POSSESSION.

1. A judgment that a party do recover possession of any land may be enforced by writ of possession in manner heretofore used in actions of ejectment in the Superior Courts of Common Law.

2. Where by any judgment any person therein named is directed to deliver up possession of any lands to some other person, the person prosecuting

\* This appears to be a clerical error for 5 Vict. c. 5.

† A writ of assistance will not now be allowed for this purpose (*Hall v. Hall*, 47 L. J. Ch. 680).

such judgment shall, without any order for that purpose, be entitled to sue out a writ of possession on filing an affidavit showing due service of such judgment and that the same has not been obeyed.

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### ORDER XLIX.

#### WRIT OF DELIVERY.

Specific  
delivery of  
chattels.

A writ for delivery of any property other than land or money may be issued and enforced in the manner heretofore in use in actions of detinue in the Superior Courts of Common Law.

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### ORDER L.

#### CHANGE OF PARTIES BY DEATH, &C.

Action not  
to abate by  
death, &c.

1. An action shall not become abated by reason of the marriage, death, or bankruptcy of any of the parties, if the cause of action survive or continue, and shall not become defective by the assignment, creation, or devolution of any estate or title pendente lite.

Substitu-  
tion of suc-  
cessor in in-  
terest.

2. In case of the marriage, death or bankruptcy, or devolution of estate by operation of law, of any party to an action, the Court or a judge may, if it be deemed necessary for the complete settlement of all the questions involved in the action, order that the husband, personal representative, trustee, or other successor in interest, if any, of such party be made a party to the action, or be served with notice thereof in such manner and form as hereinafter prescribed, and on such terms as the Court or judge shall think just, and shall make such order for the disposal of the action as may be just.

Continuance  
of action.

3. In case of an assignment, creation, or devolution of any estate or title pendente lite, the action may be continued by or against the person to or upon whom such estate or title has come or devolved.

Addition of  
new party.

4. Where by reason of marriage, death or bankruptcy, or any other event occurring after the commencement of an action, and causing a change or transmission of interest or liability, or by reason of

any person interested coming into existence after the commencement of the action, it becomes necessary or desirable that any person not already a party to the action should be made a party thereto, or that any person already a party thereto should be made a party thereto in another capacity, an order that the proceedings in the action shall be carried on between the continuing parties to the action, and such new party or parties, may be obtained *ex parte* on application to the Court or a judge, upon an allegation of such change, or transmission of interest or liability, or of such person interested having come into existence. *Ex parte order.*

5. An order so obtained shall, unless the Court or judge shall otherwise direct, be served upon the continuing party or parties to the action or their solicitors, and also upon each such new party, unless the person making the application be himself the only new party, and the order shall from the time of such service, subject nevertheless to the next two following rules, be binding on the persons served therewith, and every person served therewith who is not already a party to the action shall be bound to enter an appearance thereto within the same time and in the same manner as if he had been served with a writ of summons. *Service of order.*

6. Where any person who is under no disability or under no disability other than coverture, or being under any disability other than coverture, but having a guardian ad litem in the action, shall be served with such order, such person may apply to the Court or a judge to discharge or vary such order at any time within twelve days from the service thereof. *Varying of order by guardian ad litem.*

7. Where any person being under any disability other than coverture, and not having had a guardian ad litem appointed in the action, is served with any such order, such person may apply to the Court or a judge to discharge or vary such order at any time within twelve days from the appointment of a guardian or guardians ad litem for such party, and until such period of twelve days shall have expired such order shall have no force or effect as against such last-mentioned person. *By person under disability without guardian.*

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## ORDER LI.

## TRANSFERS AND CONSOLIDATION.

Transfer by  
Lord  
Chancellor.

1. Any action or actions may be transferred from one division to another of the High Court or from one judge to another of the Chancery Division by an order of the Lord Chancellor, provided that no transfer shall be made from or to any division without the consent of the President of the Division.

Transfer of  
cause for  
trial only.

1A. In the Chancery Division a transfer of a cause from one judge to another may, by the same or a separate order, be ordered to be made, or to be deemed to have been made for the purpose only of trial or of hearing, and in such case the original and any further hearing shall take place before the judge to whom the cause shall be so transferred; but all other proceedings therein, whether before or after the hearing or trial of the cause, shall be taken and prosecuted in the same manner as if such cause had not been transferred from the judge to whom it was assigned at the time of transfer, and as if such judge had made the decree or judgment, if any, made therein, unless the judge to whom the cause is transferred shall direct that any further proceedings therein, before or after the hearing or trial thereof, shall be taken or prosecuted before himself, or before an official or special referee.

Transfer of  
action at  
any stage.

2. Any action may, at any stage, be transferred from one division to another by an order made by the Court or any judge of the division \* to which the action is assigned: provided that no such transfer shall be made without the consent of the President of the division to which the action is proposed to be transferred.

Transfer  
where wind-  
ing-up or  
administra-  
tion action.

2A. When an order has been made by any judge of the Chancery Division for the winding-up of any company under the Companies Acts, 1862 and 1869, or for the administration of the assets of any testator or intestate, the judge in whose Court such winding-up or administration shall be pending shall have power, without any further consent, to order the transfer to such judge of any action pending in

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\* The order may be made by the judge at chambers, although he belong to a different division (*Hillman v. Mayhew*, 45 L. J. Ex. 334; L. R. 1 Ex. D. 132).



any other division brought or continued by or against such company, or by or against the executors or administrators of the testator or intestate whose assets are being so administered, as the case may be.

3. Any action transferred to the Chancery Division or the Probate Division, shall, by the order directing the transfer, be directed to be assigned to one of the judges of such division to be named in the order.

In Chancery or Probate Divisions transfer to judge.

4. Actions in any division or divisions may be consolidated by order of the Court or a judge in the manner heretofore in use in the Superior Courts of Common Law.

Consolidation of actions.

## ORDER LII.

### INTERLOCUTORY ORDERS AS TO MANDAMUS INJUNCTIONS OR INTERIM PRESERVATION OF PROPERTY, &c.

1. When by any contract a *prima facie* case of liability is established, and there is alleged as matter of defence a right to be relieved wholly or partially from such liability, the Court or a judge may make an order for the preservation or interim custody of the subject-matter of the litigation, or may order that the amount in dispute be brought into court or otherwise secured.

Interim custody of subject-matter of litigation.

2. It shall be lawful for the Court or a judge, on the application of any party to any action, to make any order for the sale, by any person or persons named in such order, and in such manner, and on such terms as to the Court or judge may seem desirable, of any goods, wares, or merchandise which may be of a perishable nature or likely to injure from keeping, or which for any other just and sufficient reason it may be desirable to have sold at once.

Sale of perishables, &c.

3. It shall be lawful for the Court or a judge, upon the application of any party to an action, and upon such terms as may seem just, to make any order for the detention, preservation, or inspection of any property being the subject of such action, and for all or any of the purposes aforesaid to authorize any person or persons to enter upon or into any land or building in the possession of any party to such action, and for all or any of the purposes aforesaid to authorize any samples to be taken, Samples.

Detention or inspection of property.

or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

Applica-  
tions for  
order for  
mandamus,  
injunction,  
or receiver.

4. An application for an order under sect. 25, sub-sect. 8 of the act, or under rules 2 or 3 of this order, may be made to the Court or a judge by any party. If the application be by the plaintiff for an order under the said sub-sect. 8 it may be made either *ex parte* or with notice, and if for an order under the said Rules 2 or 3 of this order it may be made after notice to the defendant at any time after the issue of the writ of summons; and if it be by any other party, then on notice to the plaintiff, and at any time after appearance by the party making the application.

Time for  
application  
under  
Rule 1.

5. An application for an order under Rule 1 may be made by the plaintiff at any time after his right thereto appears from the pleadings; or, if there be no pleadings, is made to appear by affidavit or otherwise to the satisfaction of the Court or a judge.

Claim of  
lien.

6. Where an action is brought to recover, or a defendant in his statement of defence seeks by way of counter-claim to recover specific property other than land, and the party from whom such recovery is sought does not dispute the title of the party seeking to recover the same, but claims to retain the property by virtue of a lien or otherwise as security for any sum of money, the Court or a judge may, at any time after such last-mentioned claim appears from the pleadings, or, if there be no pleadings, by affidavit or otherwise to the satisfaction of such Court or judge, order that the party claiming to recover the property be at liberty to pay into Court, to abide the event of the action, the amount of money in respect of which the lien or security is claimed, and such further sum (if any) for interest and costs as such Court or judge may direct, and that upon such payment into Court being made, the property claimed be given up to the party claiming it.

6A. Whenever the trusts of any will or settlement are being administered, and a sale is ordered of any property vested in the trustees of such will or settlement upon trust for sale or with power of sale by such trustees, the conduct of such sale shall be given to such trustees unless the judge shall otherwise direct.

## ORDER LIII.

## MOTIONS AND OTHER APPLICATIONS.

1. Where by these rules any application is authorized to be made to the Court or a judge in an action, such application, if made to a divisional Court or to a judge in Court, shall be made by motion.

All applications to be by motion.

2. No rule or order to show cause shall be granted in any action, except in the cases in which an application for such rule or order is expressly authorized by these rules.

Orders to show cause.

3. Except where by the practice existing at the time of the passing of the said act any order or rule has heretofore been made *ex parte* absolute in the first instance, and except where by these rules it is otherwise provided, and except where the motion is for a rule to show cause only, no motion shall be made without previous notice to the parties affected thereby. But the Court or judge, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief, may make any order *ex parte* upon such terms as to costs or otherwise, and subject to such undertaking, if any, as the Court or judge may think just; and any party affected by such order may move to set it aside.

Notice of motion to parties affected.

4. Unless the Court or judge give special leave to the contrary, there must be at least two clear days between the service of a notice of motion and the day named in the notice for hearing the motion.\*

Time between motion and hearing.

5. If on the hearing of a motion or other application the Court or judge shall be of opinion that any person to whom notice has not been given ought to have or to have had such notice, the Court or judge may either dismiss the motion or application, or adjourn the hearing thereof, in order that such notice may be given, upon such terms, if any, as the Court or judge may think fit to impose.

Consequence of failure to give notice.

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\* Where notice of motion is served, but the motion not made, costs will be given to the party attending to oppose the motion (*Berry v. Exchange Trading Co.*, L. R. 1 Q. B. D. 77), but not where the notice of motion is void on the face of it (*Daubney v. Shuttleworth*, 45 L. J. Ex. 177; L. R. 1 Ex. D. 53).

Adjourn-  
ment.

6. The hearing of any motion or application may from time to time be adjourned upon such terms, if any, as the Court or judge shall think fit.

Service of  
notice of  
motion.

7. The plaintiff shall, without any special leave, be at liberty to serve any notice of motion or other notice, or any petition or summons, upon any defendant who, having been duly served with a writ of summons to appear in the action, has not appeared within the time limited for that purpose.

Before  
appearance.

8. The plaintiff may, by leave of the Court or a judge to be obtained *ex parte*, serve any notice of motion upon any defendant along with the writ of summons, or at any time after service of the writ of summons and before the time limited for the appearance of such defendant.

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## ORDER LIV.

### APPLICATIONS AT CHAMBERS.

Summons

1. Every application at chambers authorized by these rules shall be made in a summary way by summons.

Jurisdiction  
of master in  
Queen's  
Bench, &c.  
Divisions.

2. In the Queen's Bench, Common Pleas and Exchequer Divisions a master, and in the Probate, Divorce and Admiralty Division a registrar, may transact all such business and exercise all such authority and jurisdiction in respect of the same as under the act, or the schedule thereto, or these rules, may be transacted or exercised by a judge at chambers, except in respect of the following proceedings and matters ; that is to say,—

Exceptions,  
in which  
master may  
not exercise  
jurisdiction  
of judge.

All matters relating to criminal proceedings or to the liberty of the subject :

The removal of actions from one division or judge to another division or judge :

The settlement of issues, except by consent :

Discovery, whether of documents or otherwise, and inspection, except by consent :

Appeals from district registrars :

Interpleader other than such matters arising in interpleader as relate to practice only, except by consent :

Prohibitions :

Injunctions and other orders under sub-section 8 of section 25 of the act, or under Order LII., Rules 1, 2, and 3 respectively :

Awarding of costs, other than the costs of any proceeding before such master :

Reviewing taxation of costs :

Charging orders on stock funds, annuities, or share of dividends or annual produce thereof :

Acknowledgments of married women.

2A. The exception contained in rule 2 of Order LIV. is hereby repealed so far as regards the proceedings hereinafter mentioned before the masters of the Queen's Bench, Common Pleas, and Exchequer Divisions, and such masters may exercise all such authority and jurisdiction as may be exercised by a judge at chambers in respect of—

Exceptions restricted.

*Discovery*, whether of documents or otherwise, and inspection, except inspection under Order LII., rule 3 ;

*Orders nisi* for charging stock, funds, annuities, or share of dividends, or annual proceeds thereof ;

*Interpleader*, except where all parties concerned consent to a final determination of the question in dispute without a jury or special case, and except where the sum in dispute is less than 50*l.*, and one of the parties desires such a determination. In such cases the question shall be determined by the judge, unless the parties agree to refer it to the master.

2A.\* The authority and jurisdiction of the district registrar or of a Master of the Queen's Bench, Common Pleas, or Exchequer Divisions shall not extend to granting leave for service out of the jurisdiction of a writ of summons or of notice of a writ of summons.

Leave to serve out of jurisdiction.

3. If any matter appears to the master proper for the decision of a judge, the master may refer the same to a judge, and the judge may either dispose of the matter, or refer the same back to the master with such directions as he may think fit.

Reference by master to judge.

4. Any person affected by any order or decision of a master may appeal therefrom to a judge at chambers. Such appeal shall be by summons, within four days after the decision complained of,

Appeal from master to judge.

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\* So numbered in duplicate.

or such further time as may be allowed by a judge or master.

No stay  
unless  
ordered.

5. An appeal from a master's decision shall be no stay of proceeding unless so ordered by a judge or master.

Appeal to  
Court.

6. In the Queen's Bench, Common Pleas, and Exchequer Divisions, every appeal to the Court from any decision at chambers shall be by motion, and shall be made within eight days after the decision appealed against,\* or if no Court to which such appeal can be made shall sit within such eight days then on the first day on which any such Court may be sitting after the expiration of such eight days.

#### ORDER LV.

##### COSTS.

Costs—dis-  
cretionary.  
Saving for  
trustee, &c.

1. Subject to the provisions of the act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court; but nothing herein contained shall deprive a trustee, mortgagee, or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in Courts of Equity; provided that where any action or issue is tried by a jury, the costs shall follow the event, unless upon application made at the trial,† for good cause shown, the judge before whom such action or issue is tried, or the Court, shall otherwise order.

Saving,  
where jury.

Security for  
costs.

2. In any cause, or matter, in which security for costs is required, the security shall be of such amount, and be given at such time or times, and in such manner and form as the Court or a judge shall direct.

#### ORDER LVI.

##### NOTICES AND PAPER, &c.

Notices to  
be written.

1. All notices required by these rules shall be in

\* The last branch of this rule was added to remedy the effect of *Crom v. Samuels*, 46 L. J. Q. B. 1; L. R. 2 C. P. D. 21, where it was held that the eight days ran in the Long Vacation although there was no Divisional Court sitting.

† An application made an hour after the trial during another case, held not too late. (*Kynaston v. MacKinder*, 47 L. J. Q. B. 76.)

writing, unless expressly authorized by a Court or judge to be given orally.

2. Proceedings required to be printed shall be printed on cream wove machine drawing foolscap folio paper, 19lbs. per mill ream, or thereabouts, in pica type leaded, with an inner margin about three-quarters of an inch wide, and an outer margin about two inches and a-half wide. Mode of printing.

3. Any affidavit may be sworn to either in print or in manuscript, or partly in print and partly in manuscript. Affidavits.

## ORDER LVII.

### TIME.

1. Where by these rules, or by any judgment or order given or made after the commencement of the act, time for doing any act or taking any proceeding is limited by months, not expressed to be lunar months, such time shall be computed by calendar months. Month to be lunar.

2. Where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceeding, Sunday Christmas Day, and Good Friday shall not be reckoned in the computation of such limited time. Sunday, &c., not counted.

3. Where the time for doing any act or taking any proceeding expires on a Sunday, or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall, so far as regards the time of doing or taking the same, be held to be duly done or taken, if done or taken on the day on which the offices shall next be open.\* Sunday, &c., last day.

4. No pleadings shall be amended or delivered in the long vacation unless directed by a Court or a judge. Long vacation.

5. The time of the long vacation shall not be reckoned in the computation of the times appointed or allowed by these rules for filing, amending, or delivering any pleading, unless otherwise directed by a Court or a judge. Counting time in vacation.

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\* This rule applies to the time for making a motion, so that if the eight days for moving to rescind an order at chambers expire on a Sunday, the motion may be made on Monday (*Taylor v. Jones*, 45 L. J., C. P., 110).

Enlargement of time.

6. A Court or a judge shall have power to enlarge or abridge the time appointed by these rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any), as the justice of the case may require, and any such enlargement may be ordered, although the application for the same is not made until after the expiration of the time appointed or allowed.

Early hearing of Admiralty actions.

7. In Admiralty actions the Court or a judge shall have power at any stage of the proceedings in such action, upon a motion or summons by either party, calling upon the other party to show cause why the trial of such action should not take place on an early day to be appointed by the Court or a judge, to appoint that such trial shall take place on any day or within any time which to the Court or judge shall seem fit; and for such purpose the Court or judge shall have power upon such motion or summons to dispense with the giving of notice of trial, or to abridge the time or times appointed by these rules for giving such notice, for the delivery of pleadings, or for doing any other act or taking any other proceeding in the action, upon such terms (if any) as the nature of the case may require.

#### ORDER LVIIA.

##### DIVISIONAL AND OTHER COURTS.

Matters to be heard by divisional Courts.

1. The following proceedings and matters shall continue to be heard and determined before the divisional Courts; but nothing herein contained shall be construed so as to take away or limit the power of a single judge to hear and determine any such proceedings or matters in any case in which he has heretofore had power to do so, or so as to require any interlocutory proceedings therein heretofore taken before a single judge to be taken before a divisional Court:

- Proceedings on the Crown side of the Queen's Bench Division;
- Appeals from Revising Barristers and proceedings relating to election petitions, parliamentary and municipal;
- Appeals under section 6 of the County Courts Act, 1875;
- Proceedings on the Revenue side of the Exchequer Division;



Proceedings directed by any Act of Parliament to be taken before the Court and in which the decision of the Court is final ;

Cases stated by the Railway Commissioners under the 36 & 37 Vict. c. 48 ;

Cases of habeas corpus in which a judge directs that a rule nisi for the writ or the writ be made returnable before a divisional Court ;

Special cases where all parties agree that the same be heard before a divisional Court ;

Appeals from Chambers in the Queen's Bench, Common Pleas, and Exchequer Divisions, and applications for new trials in the said division where the action has been tried with a jury.

2. Where by sect. 17 of the Appellate Jurisdiction Act, 1876, or by these rules any application ought to be made to, or any jurisdiction exercised by the judge before whom an action has been tried, if such judge shall die or cease to be a judge of the High Court, or if such judge shall be a judge of the Court of Appeal, or if for any other reason it shall be impossible or inconvenient that such judge should act in the matter, the president of the Division to which the action belongs may either by a special order in any action or matter, or by a general order applicable to any class of actions or matters, nominate some other judge to whom such applications may be made and by whom such jurisdiction may be exercised.

Judge dying, &c.

3. Every vacation judge shall have the same power and authority as heretofore.

Vacation judge.

## ORDER LVIII.

### APPEALS.

1. Bills of exceptions and proceedings in error shall be abolished.

Bill of exceptions, abolition of.

2. All appeals to the Court of Appeal shall be by way of rehearing, and shall be brought by notice of motion in a summary way, and no petition, case, or other formal proceeding other than such notice of motion shall be necessary. The appellant may by the notice of motion appeal from the whole or any part of any judgment or order, and the notice of motion shall state whether the whole or part only of such judgment or order is complained of, and in the latter case shall specify such part.

Appeal to be by rehearing.

3. The notice of appeal shall be served upon all parties directly affected by the appeal, and it shall

Notice of appeal.

not be necessary to serve parties not so affected; but the Court of Appeal may direct notice of the appeal to be served on all or any parties to the action or other proceeding, or upon any person not a party, and in the meantime may postpone or adjourn the hearing of the appeal upon such terms as may seem just, and may give such judgment and make such order as might have been given or made if the persons served with such notice had been originally parties. Any notice of appeal may be amended at any time as to the Court of Appeal may seem fit.

Length of  
notice.

4. Notice of appeal from any judgment, whether final or interlocutory, shall be a fourteen days' notice, and notice of appeal from any interlocutory order shall be a four days' notice.

Powers of  
Court of  
Appeal.

Further  
evidence.

5. The Court of Appeal shall have all the powers and duties as to amendment and otherwise of the Court of First Instance, together with full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in Court, by affidavit, or by deposition taken before an examiner or commissioner. Such further evidence\* may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. Upon appeals from a judgment after trial or hearing of any cause or matter upon the merits, such further evidence (save as to matters subsequent as aforesaid) shall be admitted on special grounds only, and not without special leave of the Court. The Court of Appeal shall have power to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require. The powers aforesaid may be exercised by the said Court notwithstanding that the notice of appeal may be that part only of the decision may be reversed or varied, and such powers may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision. The Court of Appeal shall

Courts.

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\* Affidavits used before the Chief Clerk but not before the judge are "further evidence" (*Jones v. Chennell*, 47 L. J. Ch. 583).

have power to make such order as to the whole or any part of the costs of the appeal as may seem just.\*

5A. If upon the hearing of an appeal from a judgment pronounced by a Judge or Court on the verdict or finding of a jury, or of a Judge without a jury, it shall appear to the Court of Appeal that a new trial ought to be had, it shall be lawful for the said Court of Appeal, if it shall think fit, to order that the verdict and judgment shall be set aside, and that a new trial shall be had.

6. It shall not, under any circumstances, be necessary for a respondent to give notice of motion by way of cross appeal, but if a respondent intends, upon the hearing of the appeal, to contend that the decision of the Court below should be varied, he shall, within the time specified in the next rule, or such time as may be prescribed by special order, give notice of such intention to any parties who may be affected by such contention. The omission to give such notice shall not diminish the powers conferred by the Act upon the Court of Appeal, but may, in the discretion of the Court, be ground for an adjournment of the appeal or for a special order as to costs.

7. Subject to any special order which may be made, notice by a respondent under the last preceding rule shall in the case of any appeal from a final judgment be an eight days' notice, and in the case of an appeal from an interlocutory order a two days' notice.

8. The party appealing from a judgment or order shall produce to the proper officer of the Court of Appeal the judgment or order or an office copy thereof, and shall leave with him a copy of the notice of appeal to be filed, and such officer shall thereupon set down the appeal by entering the same in the proper list of appeals, and it shall come on to be heard according to its order in such list, unless the Court of Appeal or a judge thereof shall otherwise direct, but so as not to come into the paper for hearing before the day named in the notice of appeal.†

\* The successful party *prima facie* has his costs notwithstanding the contrary rule which prevailed in Chancery (*Olivant v. Wright*, 45 L. J. Ch. 1).

† The appeal must be entered before the day named in the notice of motion (*Re National Funds Insurance Co.*, 45 L. J. Ch. 183).

Winding-up. Bankruptcy. Time for appeal.

9. The time for appealing from any order or decision made or given in the matter of the winding-up of a company under the provisions of the Companies' Act, 1862, or any act amending the same, or any order or decision made in the matter of any bankruptcy, or in any other matter not being an action, shall be the same as the time limited for appeal from an interlocutory order under Rule 15.

Ex parte applications.

10. Where an ex parte application has been refused by the Court below, an application for a similar purpose may be made to the Court of Appeal ex parte within four days from the date of such refusal, or within such enlarged time as a judge of the Court below or of the Appeal Court may allow.

Question of fact.

11. When any question of fact is involved in an appeal, the evidence taken in the Court below bearing on such question shall, subject to any special order,\* be brought before the Court of Appeal as follows :

Evidence.

(a) As to any evidence taken by affidavit, by the production of printed copies of such of the affidavits as have been printed, and office copies of such of them as have not been printed.

Judge's notes.

(b) As to any evidence given orally, by the production of a copy of the judge's notes, or such other materials as the Court may deem expedient.

Printing of evidence.

12. Where evidence has not been printed in the Court below, the Court below or a judge thereof, or the Court of Appeal or a judge thereof, may order the whole or any part thereof to be printed for the purpose of the appeal. Any party printing evidence for the purpose of an appeal without such order shall bear the costs thereof, unless the Court of Appeal or a judge thereof shall otherwise order.

Verified notes.

13. If, upon the hearing of an appeal, a question arise as to the ruling or direction of the judge to a jury or assessors, the Court shall have regard to

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\* An order may be made dispensing with office copies of affidavits and requiring an officer to attend with the originals on the ground of expense (*Sickles v. Norris*, 45 L. J., C. P. 148).

verified notes or other evidence, and to such other materials as the Court may deem expedient.

14. No interlocutory order or rule from which there has been no appeal shall operate so as to bar or prejudice the Court of Appeal from giving such decision upon the appeal as may seem just. Interlocutory order no bar.

15. No appeal from any interlocutory order shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days, and no other appeal shall, except by such leave, be brought after the expiration of one year.\* The said respective periods shall be calculated from the time at which the judgment or order is signed, entered, or otherwise perfected, or in the case of the refusal of an application, from the date of such refusal. Such deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be directed under special circumstances by the Court of Appeal. Time for appeal.

16. An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the Court appealed from, or any judge thereof, or the Court of Appeal, may so order; and no intermediate act or proceeding shall be invalidated, except so far as the Court appealed from may direct. Appeal no stay except as ordered

17. Wherever under these rules an application may be made either to the Court below or to the Court of Appeal, or to a judge of the Court below or of the Court of Appeal, it shall be made in the first instance to the Court or judge below. Application to court below in first instance,

18. Every application to a judge of the Court of Appeal shall be by motion, and the provisions of Order LIII. shall apply thereto.

19. Every judge of the High Court of Justice for the time being shall be a judge to hear and determine appeals from inferior Courts under section 45 of the Supreme Court of Judicature Act, 1873. All such appeals (except Admiralty appeals from inferior Courts which until further orders shall be assigned as heretofore to the present judge of the Admiralty Court) shall be entered in one list by the officers of the Crown office of the Queen's Bench. Appeals from inferior Courts.

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\* Applications to extend time to appeal after time has expired must be by notice (*Evennet v. Laurence*, 46 L. J. Ch. 119).

Division; and shall be heard by such divisional Court of the Queen's Bench, Common Pleas, or Exchequer Division as the presidents of those Divisions shall from time to time direct.

Nothing in this order shall affect the validity of any rule or regulation heretofore issued with reference to such appeals by the divisional Court formed under the said section.

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### ORDER LIX.

#### EFFECT OF NON-COMPLIANCE.

Non-compliance to be irregularity only.

Non-compliance with any of these rules shall not render the proceedings in any action void unless the Court or a judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or judge shall think fit.

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### ORDER LX.

#### OFFICERS.

Officers transferred from Courts to Divisions.

1. All officers who at the time of the commencement of the said act shall be attached to the Court of Chancery shall be attached to the Chancery Division of the said High Court; and all officers who at the time of the commencement of the said act shall be attached to the Court of Queen's Bench shall be attached to the Queen's Bench Division of the said High Court; and all officers who at the time of the commencement of the said act shall be attached to the Court of Common Pleas shall be attached to the Common Pleas Division of the said High Court; and all officers who at the time of the commencement of the said act shall be attached to the Court of Exchequer shall be attached to the Exchequer Division of the said High Court; and all officers who at the time of the commencement of the said act shall be attached to the Court of Probate, the Court of Divorce, and the Court of Admiralty respectively, shall be attached to the Probate, Divorce, and Admiralty Division of the said High Court.

2. Officers attached to any division shall follow the appeals from the same division, and shall perform in the Court of Appeal analogous duties in reference to such appeals as the registrars and officers of the Court of Chancery usually performed as to rehearings in the Court of Appeal in Chancery, and as the masters and officers of the Courts of Queen's Bench, Common Pleas, and Exchequer respectively performed as to appeals heard by the Court of Exchequer Chamber.

Officers to follow appeals.

## ORDER LXI.

### SITTINGS AND VACATIONS.

1. The sittings of the Court of Appeal and the sittings in London and Middlesex of the High Court of Justice shall be four in every year, viz., the Michaelmas sittings, the Hilary sittings, the Easter sittings, and the Trinity sittings.

Number and time of sittings.

The Michaelmas sittings shall commence on the 2nd of November, and terminate on the 21st December; the Hilary sittings shall commence on the 11th of January, and terminate on the Wednesday before Easter; the Easter sittings shall commence on the Tuesday after Easter week, and terminate on the Friday before Whitsunday.

Michaelmas, Hilary, Easter, and Trinity sittings.

The Trinity sittings shall commence on the Tuesday after Whitsun week and terminate on the 8th of August.

2. The vacations to be observed in the several courts and offices of the Supreme Court shall be four in every year, viz., the Long vacation, the Christmas vacation, the Easter vacation, and the Whitsun vacation.

Vacations.

The Long vacation shall commence on the 10th of August, and terminate on the 24th of October. The Christmas vacation shall commence on the 24th of December, and terminate on the 6th of January.

The Easter vacation shall commence on Good Friday, and terminate on Easter Tuesday, and the Whitsun vacation shall commence on the Saturday before Whitsunday, and shall terminate on the Tuesday after Whitsunday.

3. The days of the commencement and termination

- of each sitting and vacation shall be included in such sitting and vacation respectively.
- Opening of offices.** 4. The several offices of the Supreme Court shall be open on every day of the year, except Sundays, Good Friday, Monday and Tuesday in Easter week, Whit Monday, Christmas Day, and the next following working day, and all days appointed by proclamation to be observed as days of general fast, humiliation, or thanksgiving.
- Opening of District Registry offices.** 4A. The offices of each district registrar of the High Court of Justice shall be open on every day and hour in the year on which the offices of the registrar of the County Court of the place in which the district registry is situate are required to be kept open.
- Closing offices on Saturday.** 4A\*. The offices of the Supreme Court (including the judges' chambers) shall close on Saturdays at two o'clock
- Hours of sitting of official referees.** 4B. The official referees shall sit at least from 10 A.M. to 4 P.M. on every day during the Michaelmas, Hilary, Easter, and Trinity sittings of the High Court of Justice, except on Saturdays, during such sittings, when they shall sit, at least, from 10 A.M. to 2 P.M.; but nothing in this rule shall prevent their sitting on any other days.
- Vacation judges of High Court.** 5. Two of the judges of the High Court shall be selected at the commencement of each Long vacation for the hearing in London or Middlesex during vacation of all such applications as may require to be immediately or promptly heard. Such two judges shall act as vacation judges for one year from their appointment. In the absence of arrangement between the judges, the two vacation judges shall be the two judges last appointed (whether as judges of the said High Court or of any Court whose jurisdiction is by the said act transferred to the said High Court) who have not already served as vacation judges of any such Court, and if there shall not be two judges for the time being of the said High Court who shall not have so served, then the two vacation judges shall be the judge (if any) who has not so served and the senior judge or judges who has or have so served once only according to seniority of appointment, whether in the said High Court or such other Court as aforesaid. The Lord Chancellor shall not be liable to serve as a vacation judge.

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\* So numbered in duplicate.



6. The vacation judges may sit either separately or together as a divisional Court as occasion shall require, and may hear and dispose of all actions, matters, and other business to whichever division the same may be assigned. No order made by a vacation judge shall be reversed or varied except by a divisional Court or the Court of Appeal, or a judge thereof, or the judge who made the order. Any other judge of the High Court may sit in vacation for any vacation judge.

Sittings of vacation judges.

7. The vacation judges of the High Court may dispose of all actions, matters, and other business of an urgent nature during any interval between the sittings of any division of the High Court to which such business may be assigned, although such interval may not be called or known as a vacation.

Vacation judges may act at any time.

## ORDER LXII.

### EXCEPTIONS FROM THE RULES.

Nothing in these rules shall affect the practice or procedure in any of the following causes or matters : Practice unaffected by rules.

Criminal proceedings :

Proceedings on the Crown side of the Queen's Bench Division :

Proceedings on the Revenue side of the Exchequer Division :

Proceedings for Divorce or other Matrimonial Causes :

## ORDER LXIII.

### INTERPRETATION OF TERMS.

The provisions of the 100th section of the act shall apply to these rules. Interpretation.

In the construction of these rules, unless there is anything in the subject or context repugnant thereto, the several words hereinafter mentioned or referred to shall have or include the meanings following :—

“Person” shall include a body corporate or politic :

“Probate actions” shall include actions and other matters relating to the grant or recall of probate

or of letters of administration other than common form business :

“ Proper officer.”

“ Proper officer” shall, unless and until any rule to the contrary is made, mean an officer to be ascertained as follows :—

(a) Where any duty to be discharged under the act or these rules is a duty which has heretofore been discharged by any officer, such officer shall continue to be the proper officer to discharge the same :

(b) Where any new duty is under the act or these rules to be discharged, the proper officer to discharge the same shall be such officer, having previously discharged analogous duties, as may from time to time be directed to discharge the same ; in the case of an officer of the Supreme Court, or the High Court of Justice, or the Court of Appeal, not attached to any division, by the Lord Chancellor ; and in the case of an officer attached to any division, by the president of the division ; and in the case of an officer attached to any judge, by such judge :

“ The Act.”

“ The act” and “ the said act” shall respectively mean the Supreme Court of Judicature Act, 1873, as amended by this Act.

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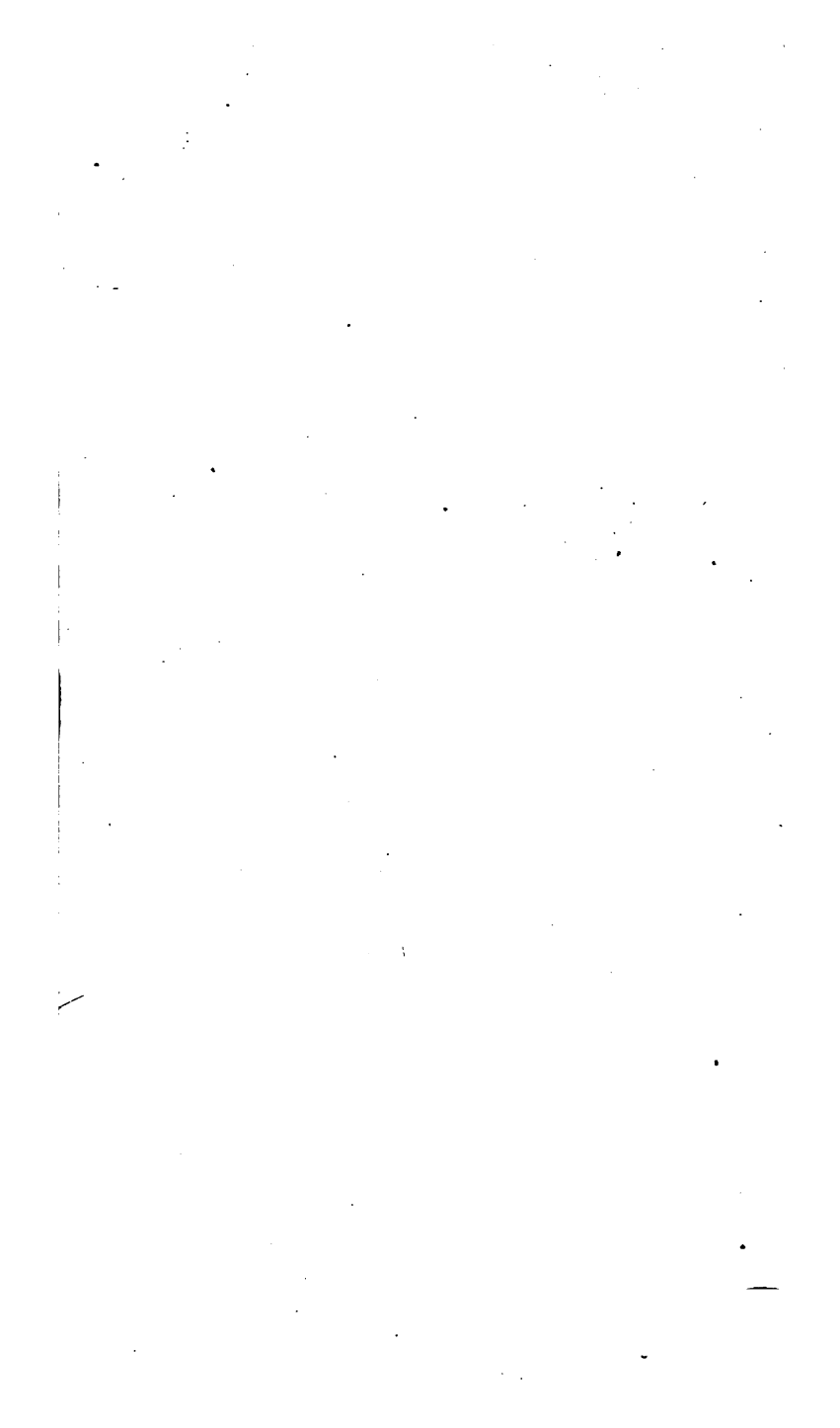
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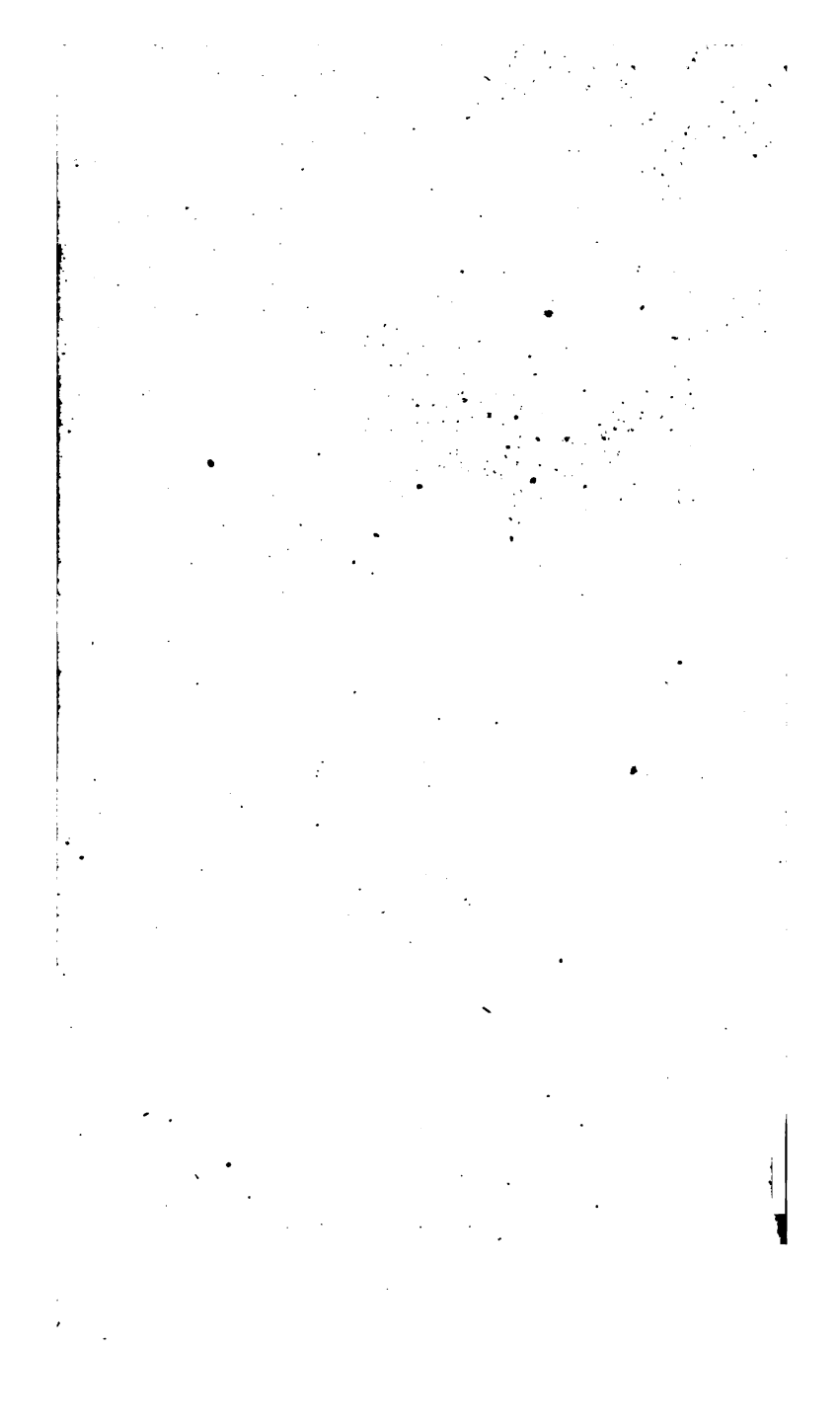
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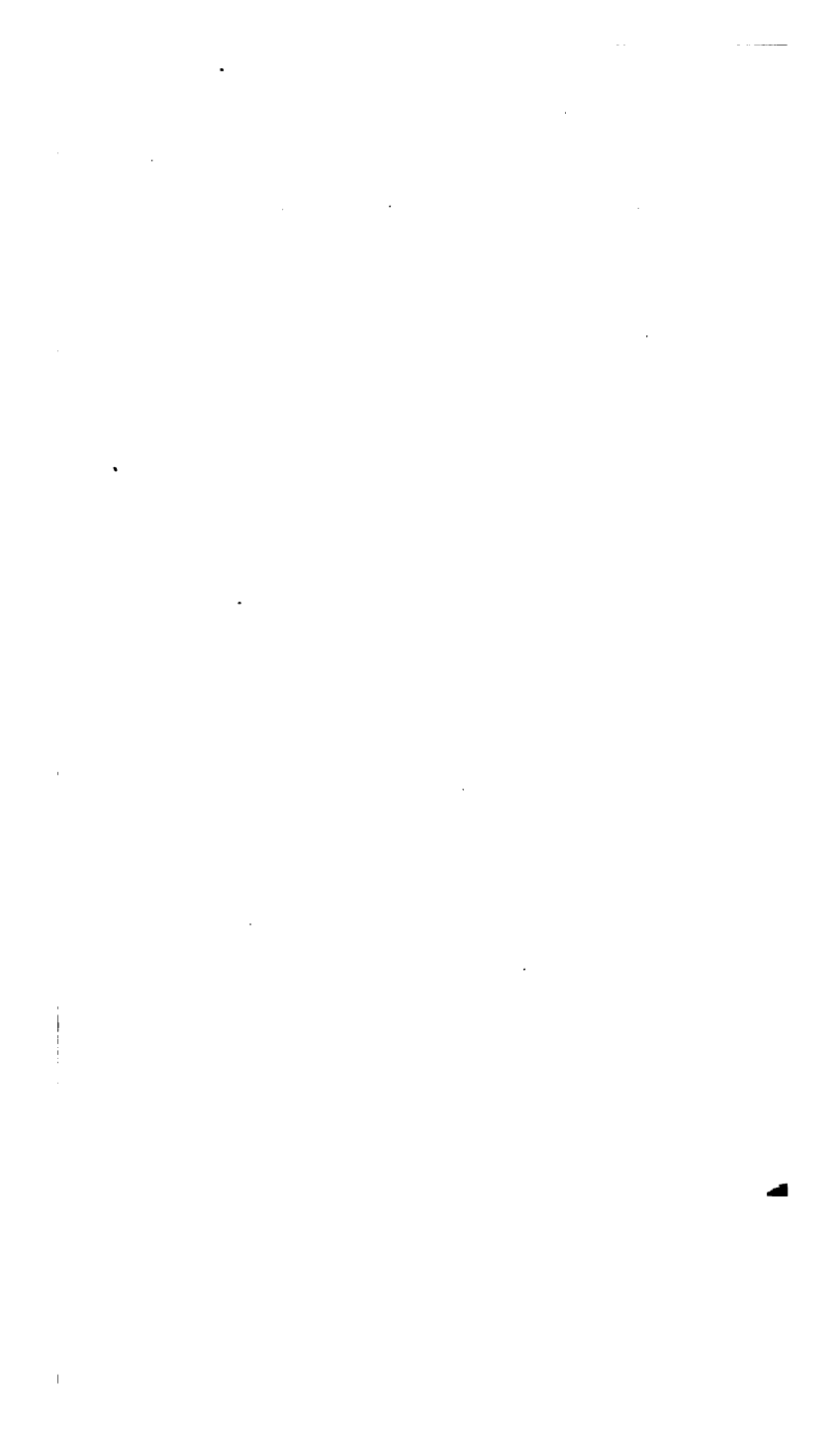












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